No. 88-226-CFX
Status: GRANTED

Title: Benjamin R. Ward, et al., Petitioners
v.
Rock Against Racism

Docketed:
August 5, 1988

Court: United States Court of Appeals
for the Second Circuit

Counsel for petitioner: Koerner,Leonard J.

Counsel for respondent: Fosbinder,Julie, Kunstler,William M.

Entry	Date	Note	Proceedings and Orders
1	Aug 5 1988	G	Petition for writ of certiorari filed.
2	Aug 5 1988		Appendix of petitioner Benjamin Ward, et al. filed.
4	Sep 6 1988	X	Brief of respondent Rock Against Racism in opposition filed.
3	Sep 7 1988		DISTRIBUTED. September 26, 1988
5	Oct 3 1988		Petition GRANTED.
			**********
7	Oct 28 1988		Order extending time to file brief of petitioner on the merits until November 29, 1988.
8	Nov 14 1988		Record filed.
		*	Certified copy of original record and proceedings, 3 volumes, box, received.
9	Nov 29 1988		Brief amicus curiae of National League of Cities, et al. filed.
10	Nov 29 1988		Brief amicus curiae of United States filed.
11	Nov 29 1988		Joint appendix filed.
12	Nov 29 1988		Brief of petitioners Benjamin Ward, et al. filed.
14	Dec 8 1988		Order extending time to file brief of respondent on the merits until January 12, 1989.
16	Jan 6 1989		SET FOR ARGUMENT MONDAY, FEBRUARY 27, 1989. (2ND CASE.)
15	Jan 11 1989		Brief of respondent Rock Against Racism filed.
17	Jan 24 1989		CIRCULATED.
18	Feb 10 1989	X	Reply brief of petitioners Benjamin Ward, et al. filed.
19	Feb 27 1989		ARGUED.

88-226

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No. 88-

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

BENJAMIN R. WARD, et. al.,

Petitioners,

-against-

ROCK AGAINST RACISM,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED

Did the Second Circuit apply the proper constitutional standard of review as articulated in prior holdings of this Court in Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984) and United States v. Albertini, 472 U.S. 675 (1984) in concluding that the municipal agency's content neutral regulations reducing offensive noise of performances in an urban park, promulgated after a lenghty and thorough investigation, which in part required that an approved private sound engineer would control the sound board thereby limiting the loudness but providing the sound mix the performers desired, was unconstitutional as an improper infringement of artistic expression under the First Amendment based on its finding that the municipality failed to prove its regulations were the "least intrusive" and that the mu-

nicipality, barring any other realistic technological alternative, could always "pull the plug" although the Court never commented on any possible threat to public safety and park property such conduct may create?

PARTIES

The parties in this case when it commenced, were as follows:

1. Rock Against Racism, plaintiff.

2. Benjamin R. Ward, in his official capacity as Police Commissioner of the City of New York, defendant.

3. George Scarpelli, in his official capacity as Chief of Operations for the Department of Parks, defendant.

4. Sheldon Horowitz, in his official capacity as Special Events Director for the Department of Parks, defendant.

5. Robert Russo, in his official capacity as Assistant Commissioner for City-wide Services for the Department of Parks, defendants.

6. Joesph Killian, in his official capacity as Program Director for The Mall Bandshell of the Bethesda Terrace area of

Central Park in New York City, Department of Parks, defendant.

7. Mayor Edward Koch, in his official capacity as Mayor of the City of New York, defendant.

8. The City of New York, defendant.

The petitioners are parties 2 through 7, defendants below.

The respondent is party 1, plaintiff below.

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Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT

The petitioners, Benjamin R. Ward, et al., respectfully pray that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Second Circuit entered in the above-titled proceeding on June 2, 1988.

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit, dated June 2, 1988 is reprinted in the Appendix at page 1. The opinion of the United States District Court for the Southern District of New York, dated April 16, 1987 is reported at 658 F. Supp. 1346 (S.D.N.Y. 1987). A copy is reprinted in the Appendix at page 23. The opinion of The United States District Court for the Southern District of New York dated April 30, 1987 is reprinted in the Appendix at page 85.

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit sought to be reviewed was dated and entered June 2, 1988. The jurisdiction of this Court is invoked under the provisions of 28

U.S.C. §1254(1). This petition has been filed within the time allowed by law.

STATEMENT OF THE CASE

a. Why Use Guidelines Were Formulated for the Bandshell.

The Central Park Naumburg Acoustic Bandshell (hereafter "Bandshell"), designed to amplify sound, is a hexagonal amphitheater (466, 809, 891).[1] The Bandshell is the most frequently used park facility in New York City (466), with the greatest portion of events attracting large crowds (466, 802). In fact, no other park facility has more events with crowds in excess of 1000 people than the Bandshell (466). The Bandshell season begins in the Spring and runs until early Fall. Approximately 160 to 175 permits issued for events in Central Park involve the use of the Bandshell (466).

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[1] References in parentheses refer to the Appendix filed in the Court of Appeals by respondents.

JOSEPH KILLIAN assumed the position of Program Director for the Mall/Bandshell/ Bethesda Terrace of the City of New York Department of Parks and Recreation ("Program Director") on January 27, 1986 (436, 438, 439). Killian was the first Program Director for the Mall/Bandshell/ Bethesda Terrace area, the position having just recently been created. At the time of his hiring, he was told by Parks officials that the new position had been created to consolidate the fragmented responsibility for the Bandshell, and in recognition of the Bandshell's unique function as the busiest New York City park facility (464-465, 803). As an adjunct to the fragmented bureaucratic structure surrounding the Bandshell, Killian was advised there was a lack of a single source of rules governing it's use (803). In response, Killian's initial and primary responsibility when he commenced employment

with the City was to develop a set of guidelines to be applied consistently to all applicants for the Bandshell area (hereafter referred to as the "Use Guidelines") (470). Use Guidelines were to apply to all sponsors of events at the Bandshell regardless of the type of event or expression presented (478). The Guidelines were never intended to limit or restrict the type of event (478); rather, they were to inform prospective applicants of the varied potential of the Bandshell, and to specify what was expected of them as users of the Bandshell (471).

Prior to his employment with the City, Killian had been intimately involved in theatre, dance, music concerts and special events programming and production and, therefore, was familiar with the general framework that would be needed to create the Use Guidelines (804). To develop specific guidelines appropriate for the

Bandshell facility, Killian familiarized himself with the particular characteristics, requirements, strengths, and disadvantages of the Bandshell, as well as its organizational place in the Parks Department (804).

Killian learned that Central Park receives more than 13,000,000 visitors annually (802). He found that recent studies reviewed by the Parks Department showed that the large majority of visitors to Central Park came to relax (456, 473, 809, 824-829). On the weekends, passive recreation accounted for over 80 percent of park use, with simple "relaxation" alone reaching nearly 60 percent (456, 809, 824, 827). Music accounted for 5.7 percent of weekend park use (826; see, copy of 1983 City University of New York Study of Central Park [825-849]).

Two or three hundred yards southwest of the Bandshell is the Central Park area known as the "Sheep Meadow" (809). It is a thirteen-acre plot of land set aside for passive recreation (453,809). The Sheep Meadow was designated a quiet zone, along with several other areas throughout the City, by mayoral decree of Edward I. Koch on July 25, 1985 (453, 809). No organized sports are allowed in the Sheep Meadow; people sun themselves there, read books, sit down and relax (809). According to Robert Russo, a Deputy Commissioner of Operations, visitors in the Sheep Meadow are affected by loud performances in the Bandshell (888).

b. Why the City System Decided to Require Use of Its Own Sound Amplification for Events at the Bandshell.

In formulating the Use Guidelines, the decision was made to require use of the City's sound amplification for events at the Bandshell. Killian's decision was rooted in

two problems his investigation disclosed. Sound amplification at the Bandshell conflicted with the enjoyment of other park users, as well as residents in nearby, park-adjacent buildings. Since the Bandshell "is in the heart of the park" (480) and, as noted, passive recreation accounted for over 80 percent of the Park's use, Killian was concerned with past complaints which indicated "that sound levels were continuing to bleed out beyond the concert ground area for many events" (455). Moreover, Killian had to consider the close proximity of the Sheep Meadow, a designated "quiet zone" (453) because "(p)eople enjoy sunbathing and relaxing" (486). Killian was not interested in controlling the "content or quality" of Bandshell events (581).

The second reason Killian decided that sound amplification at the Bandshell should be provided by the Department of Parks was

that he learned "that groups were often unfamiliar with producing events outdoors and they would come in with inadequate equipment and both their event and also the audience that was there would suffer" (450). Killian learned that such groups unable to "mix" the sound very well, would resort to loudness to compensate for their lack of mixing skill (843). Therefore Killian was "looking for a way that we could provide quality sound and yet sound that did not bleed over into other areas of the park ..." (488). To achieve this purpose, Killian decided to hire a private sound company for all Bandshell events.

Killian indicated that he had considered alternative solutions to the sound problem. He considered negotiating with each individual group and agreeing on a decibel level (489). He considered allowing the public user to bring in its own sound system

while the Department of Parks would provide the sound technician (489). Killian considered as his third option "getting an independent vendor to provide sound, someone with extensive experience in all phases of music and dance and theatre to provide sound" (489). The first option was rejected because it was impossible to pick out a single decibel level because it could not be enforced and differences in temperature, foliage and audience size made picking one decibel level "very, very difficult" (490, 575, 576). The second option was rejected because most technicians prefer to work with their own equipment (489), and lack of familiarity with the equipment would interfere with their ability to do a good job. In this way, Killian concluded that his third option was the most viable (489).

After the decision was reached to hire a private company, Killian contacted Gary Floyd as a consultant to draw up a "menu" of basic needs the Department of Parks would want from a private sound company (491). Killian told Floyd he "wanted somebody with outdoor experience, good quality reputation, and also a good inventory ... I wanted to make sure they could do an entire season without breakdown" (494). Floyd was qualified for the job because he was a self-employed consultant who advises clients regarding sound, lighting and staging of performance and theatrical events (336). He had been working in the area for 17 years (336).

After evaluating proposals by independent sound companies with Floyd (341, 342), New York Sound (hereafter "NYS") was chosen by Killian as the private vendor to provide sound amplification at

Bandshell events. NYS was selected because "they had the most extensive state-of-the-art equipment and they had the most backup and they had extensive outdoor experience" and the lowest bid (495). NYS provided sound amplification at every event in 1986 except for the RAR event (496). Killian stated that even after NYS was chosen, private sponsors who had put in applications for the 1986 season were sent a "tech requirement form" to fill out by which they could advise NYS what type of sound equipment, such as microphones, speakers and amplifiers, they would need at their event (496-497, 851-852).

Killian acknowledged that after NYS was chosen, all the private sponsors were "concerned." However, no sponsor canceled, and of the 50 to 60 amplified events which Killian attended in the 1986 season that NYS worked (498, 501),

including speeches, poetry, dance, theatre, jazz, opera and children's groups, no one expressed dissatisfaction or complained that the quality of the sound provided was inadequate (498-499). At the amplified events, "[t]he private sponsors would designate one person to be at the mixing board[2] and to say to the [NYS] technician what their preference on sound quality was" (501). Killian believed that "[NYS] tried to reflect the sponsor's interest as best as possible" (501). NYS provided a "consistency factor" because of its familiarity with the outdoor concert grounds and the bandshell itself (522).

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[2] As explained by RAR's sound technician, ALAN THOMPSON, the mixing board is a console that combines all the sound signals from individual microphones placed before vocalists or instrumental performers, and "mix(es) them into one signal and feed(s) it into the sound system" (74).

c. How the Sound Company Was Chosen to Amplify Sound Events at the Bandshell.

GARY FLOYD, who was hired by Killian to assist him in evaluating proposals or bids for sound amplification at the Bandshell submitted by sound companies, made his recommendation based on three factors: 1) breadth of inventory of equipment (353); 2) recommendations from contractors who used the services of the bidders (353); 3) the ability to provide more than just sound, but expertise and assistance to performers (351-352). After a trial basis of nine performances, NYS was hired by the City (355). NYS provided service for the "full range of things," ... folk musicians, rhythm and blues, rock and roll. (362). Floyd found the reaction from performers was positive (361) and no audience complained of inadequate mix (363). As for the "louder events," Floyd was of the view that NYS

showed "remarkable sensivity" to balancing volume and esthetic mix" (362-363).

Floyd did not believe that placing a City-designated engineer at the sound board compromised the reproduction of amplified sound (386, 390). The technician, explained Floyd, gets his information from the performers at a "sound check" before the show (389). In this way, concluded Floyd, an experienced technician can within a span of "generally five minutes" provide the desired mix of any band (390).

d. How the Sound Level Is Determined at a Bandshell Event.

Killian explained that "the private sponsor would basically designate one person to be at the mixing board and to say to [the City-designated] technician at the board what their preference on sound quality was" (501). In other words, the technicians

would mix according to the sponsor's direction (492).

Volume was not set a one level because if more people arrived at an event, the volume might have to be raised (493-494). If there was a disagreement between the sponsor and the City technician about volume, they would discuss the excessive sound and the fact it was bleeding into adjacent areas (493, 505, 508-509, 511). The sponsor and City technician would go to the periphery of the concert ground and then go back to the mixing board and adjust the volume (505). Killian could not recall an instance where the sponsor objected to sound being turned down if it was excessive outside the concert area (511).

e. RAR Saw the Outer Limit on Volume as That Which Causes "People's Ears to Bleed."

Robert Russo, Deputy Commissioner of Operations for the Department of Parks, found that there was always a volume problem at RAR events. When asked to turn the sound down, RAR sometimes complied, sometimes they did not (637, 654, 656). They could not be relied upon to voluntarily turn down the sound (657). In 1983 and 1984, the police "pulled the plug" on the sound system at an RAR event because it had gone on beyond the time allowed by the Park's permit (331).

ALAN THOMPSON, sound engineer for RAR, explained that RAR would rent a sound setup that all the bands shared. Thompson explained that if RAR did not provide the sound equipment, the bands would bring their own equipment and charge RAR "by expenses" (99).

As for a limit on sound, Thompson stated:

> A. I think a volume that cause people's ears to bleed would be too loud (121-122).

* * *

As to a sound level unreasonably loud, Thompson stated:

> I would say that a painfully loud -- if it was painfully loud that would be unreasonably loud (121-122).

Thompson acknowledged that he was unfamiliar with the quality of equipment provided by NYS, the company hired by the Parks Department to provide sound at Bandshell events (127). He also admitted that he had not attended any event at the Bandshell in 1986 during which NYS provided the sound amplification (128). Accordingly, Thompson had "no way of knowing how [New York Sound] produce[d] an event" (128).

f. The District Court's Opinion.

The theory of plaintiff's amended complaint, dated October 30, 1986 (amended after issuance of the Use Guidelines) was that the Guidelines violated their First Amendment rights by "illegally ... regulating the manner and presentation of sound through a sound system." After five days of testimony (A27)[3], the District Court found the objective of the City in hiring a sound company was to place control of the volume in its hands and ensure the quality of sound at Bandshell events (A40). This approach arose out of the City's concern that amplified sound generated at Bandshell events be sufficient to reach all listeners in the defined concert areas but that the sound

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[3] References preceded by the letter "A" are references to the Appendix to this petition.

not extend unnecessarily beyond the listening area (A43).

The District Court found the City had a legitimate governmental interest in controlling excessive sound (A44). Sponsors of events at the Bandshell are entitled under the First Amendment to content-neutral regulations which guarantee them a level of sound amplification reasonably necessary to carry their message to the outer boundaries of the audience area (A45). In this light, the District Court found the content-neutral sound amplification regulations were sufficiently narrowly tailored to further a legitimate state interest (A47-48). The City's implementation of the Bandshell guidelines provides for a sound amplification system capable of meeting RAR's technical needs and leaves control of the sound "mix" in the hands of RAR (A46-47).

After issuance of the District Court's opinion, RAR moved to amend the judgment to clarify whether the Opinion and Order allowed RAR to "actually control the mixing board and sound system." The District Court interpreted RAR's motion to "suggest" that the City-designated technician "is not able properly to implement a sponsor's instructions as to sound quality or mix" (A89). Significantly, the District Court found:

> No evidence to that effect was offered at trial; as noted, the evidence is to the contrary (A89).

Accordingly, the District Court expressed its intention that control of the mixing board would be in the hands of the City-designated technician (A88). However, the technician, the District Court ordered, "is required to defer to the sponsor's desires as to sound quality, but not to the sponsor's demands for increased volume, subject only to those

constitutional entitlements described in the prior opinion" (A88-89). In other words, the District Court not only found that the guidelines did not infringe on RAR's First Amendment rights, but it "ordered" the City to follow the Guidelines in order to insure that RAR's rights remained intact.

g. The Court of Appeals' Opinion

The Court of Appeals did not disagree with the District Court conclusion that the City had the right to regulate expressive conduct which has harmful effects on others (A10). The Court recognized the priniciple that content-neutral time, place and manner regulations are permissible so long as they are narrowly tailored to serve a governmental interest and do not unreasonably limit alternative avenues of expression (A11):

> However, the method and extent of such regulation must be

> reasonable, that is, it must be the least intrusive upon freedom of expression as is reasonably necessary to achieve a legitimate purpose of the regulation. United States v. O'Brien, 391 U.S. 367, 377 (1968); Legi-Tech Services, Inc. v. Keeper, 766 F.2d 728, 735 (2d Cir., 1985). See United States v. Albertini, 472 U.S. 675, 688-89 (1985) (A12).

Applying its "least intrusive" test to the facts at bar, the Court of Appeals held the City's regulation valid only to the extent necessary to control volume (A18). The Court found that this end could be "achieved by a volume limiting device in possession or control of a city employee" (A18). The Court added that the City "has not shown that the use of devices to limit sound output is not technologically feasible" (A19). In any event, the Court concluded that the City could resort to pulling the plug (A21, n. 6). The Court's opinion failed to reveal that the Court had any appreciation of the substantial risk to public safety and park

property that such suggested conduct would create.

Finally, the Court concluded that the City's regulations somehow standardized a musician's expression (A21). No facts were cited by the Court to substantiate its conclusion, nor was reference made to the District Courts' fact-finding that the evidence at trial demonstrated that the sponsor's instructions regarding sound quality or mix could be achieved under the City's Use Guidelines.

Accordingly, the Court of Appeals upheld the District Court's judgment in so far as it sustained the right of the City to limit volume of performances at the Bandshell (A22). To the extent the District Court upheld the Use Guidelines requirement of the use of a sound system and a designated technician, it was reversed (A22).

REASONS FOR GRANTING THE WRIT

The United States Court of Appeals for the Second Circuit held that the Use Guidelines promulgated by the Department of Parks requiring permitees of the Naumberg Bandshell in Central Park to use the Park's sound system and sound technician were unconstitutional in that the designated method of regulating the volume of sound was not the "least intrusive" upon the freedom of expression. The Court did not disagree with the District Court that the City had the right to regulate excessive noise in the Bandshell with content-neutral time, place and manner regulations. But in a most extreme application of the "least intrusive" principle it found that the City could retain control of the volume emitted from the loudspeaker system but not the sound mix. This fine distinction improperly substitutes the judgment of a Court for that

of a locality in determining what is an appropriate time, place and manner regulation. The inappropriateness of the Court of Appeals distinction between controlling the sound and mix is highlighted by its suggestion that if there is no method whereby the City could control only volume, the City could "[a]s a last resort", pull the plug to enforce the sound limit. It does not have to be emphasized that "pulling the plug" during a concert before a large excited audience is not a practical alternative.

The Court of Appeals failed to address itself to any of these local problems, including technological feasibility of its ordained solution and the risk to public safety and park property in the event the plug is pulled on an event, problems that confronted the Park's Department when it devised its regulation scheme. Moreover,

the Circuit Court, while alleging that the City's regulation "standardized" expression, simply ignored the fact-finding by the District Court that the evidence adduced at trial had demonstrated that artistic expression remained intact because the City technician had to follow the "sponsor's instructions as to sound quality or mix." In other words, RAR had in no way established that their speech was restricted.[4]

The holding of the Court of Appeals marks the continued intransigence by certain federal appellate courts including the Seventh and Eighth Circuits, to the mandate of this Court that due deference must be

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[4] In fact, RAR was completely unfamiliar with the quality of the equipment provided by the City's hired sound company, never having used the equipment or attended an event at the Bandshell conducted pursuant to the Guidelines (128). Moreover RAR was unaware of how the sound company and the City technician "produce[d] an event" (128).

accorded legislative bodies enacting statutes that are more attuned to the problems of the locale and who are in a better position to make remedial determinations than a court, particularly when the challenged regulations are content-neutral. It is submitted that this Court should address the practice of applying the "least intrusive standard" to the "narrowly tailored prong" test of content-neutral regulations in a manner that results in ad hoc determinations by Courts of Appeal under the guise of First Amendment analysis, and thereby place an onerous standard of review on responsible agencies while allowing improper judicial usurpation of the function of government. As we will show below, this decision violates the spirits and principles of this Court's decision in Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984).

The Second Circuit's reading of a "least intrusive standard" into the "narrowly tailored prong" test of content-neutral regulations conflicts with the decisions of this Court and other Circuits.

(1)

Regulations enacted for the purpose of restraining speech on the basis of its content "presumptively" violate the First Amendment. City Renton v. Playtime Theatres, ___ U.S. ___, 106 S. Ct. 925, 928 (1986). However, content-neutral time, place and manner regulations are permitted if they are narrowly tailored to serve a substantial governmental interest and leave ample alternative avenues of communication. Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984); Perry Education Ass'n v. Perry Local Educators Ass'n, 460 U.S. 37, 45 (1983); Heffernon v. International Soc'y for Krishna Consciousness, 452 U.S. 640, 648 (1980). In the case at bar, the substantial

governmental interest served by regulating the loudness of performances at the Bandshell was the well-being and tranquility of the users of the park and the adjoining community. Kovacs v. Cooper, 336 U.S. 77, 83 (1949). See also Grayned v. City of Rockford, 408 U.S. 104, 119 (1972) (antinoise ordinance was a reasonable regulation; appellant's conduct interfered with the rights of others); Members of the City Council v. Taxpayers for Vincent, 466 U.S. 789, 806 (1984) (The state has a substantial interest in protecting its citizens from unwelcome noise). The Second Circuit determined, however, that any regulation of speech, not withstanding the type or nature of the local interest served, must be imposed in the "least intrusive" manner possible in order that it can be determined to have been "narrowly tailored." Not only does this approach cast adrift this Court's holdings

that the level of scrutiny of time, place and manner regulations varies with the nature of the forum (Perry Education Ass'n v. Perry Local Educators Ass'n, supra, 460 U.S. at 45), but it allows lower courts to render ad hoc holdings as "(a) judge would be unimaginative indeed if he could not come up with something a little less 'drastic' or a little less restrictive in almost any situation ..." Illinois Election Board v. Socialist Workers Party, 440 U.S. 173, 188-89 (1979) (Blackman, J. concurring). This skewed reading of the Court's prior decisions warrants this Court's attention.

In Clark v. Community for Creative Non-Violence, supra, 468 U.S. at 299, this Court addressed itself directly to the contention that a National Park Service regulation prohibiting sleeping in a park, as part of a demonstration to call attention the the plight of the homeless, was

unconstitutional because a lower court could hypothesize a less speech-restrictive alternative:

> We are unmoved by the Court of Appeals' view that the challenged regulation is unnecessary, and hence invalid, because there are less restrictive alternatives that could have satisfied the government's interest in preserving park lands.

Finding that the Court of Appeals had impermissibly usurped the function of the local authority, this Court held that:

> We do not believe, however, that either the United States v. O.Brien [391 U.S. 367] or the time, place, and manner decisions assign to the judiciary the authority to replace the Park Service as manager of the nation's parks. Id.

In the case at bar, the Second Circuit not only replaced the Park's Department as manager of the Naumberg Bandshell, but it ignored the factual finding of the District Court that RAR did not need to control the mixing panel to properly implement the

quality and mix of the performances at the Bandshell. Instead, the Second Circuit, locked into its least intrusive standard, provided a solution for a problem that did not exist, and without any technical foundation, held itself out as an electronics expert and ordered the Parks Department to limit volume by use of a "device in possession or control of the City employee." Absent this control, the City can, as so blithely suggested by the Court of Appeals, pull the plug on a musical event and hope that the police can insure public safety and protect park property by controlling the disappointed crowd which may number as many as five thousand.

The standard applied by the Second Circuit is directly contrary to the mandate of this Court. The validity of neutral regulations does not hinge on whether "there is some imaginable alternative that might be

less burdensome on speech." United States v. Albertini, 472 U.S. 675, 689 (1984). Likewise, "[t]he validity of such regulations does not turn on a judge's agreement with the responsible decisionmaker concerning the most appropriate method for promoting significant government interests." Id. See City of Renton v. Playtime Theaters, supra, ___ U.S. ___, 106 S. Ct. at 928. In other words, the measure of the constitutional validity of a content-neutral regulation is not by way of the inflexible standard used by the Second Circuit.

In Clark v. Community for Creative Non-Violence, supra, 468 U.S. at 297, this Court held that the fact that a more carefully drafted regulation banning sleeping in parks could have accomplished the purposes of the Park's Services "more effectively or less clumsily" than the regulation enacted did not make the

regulation constitutionally infirm. It should not be the function of the Second Circuit to substitute its own judgment as how best to protect the interests of surrounding residents and park users who choose to relax or read or sunbathe from the noise of an event at the Bandshell. "The validity of such regulations does not touch on a judge's agreement with the responsible decision-maker concerning the most appropriate method for promoting significant government interests." United States v. Albertini, supra, 472 U.S. at 689.[5]

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[5] In analogous Fourth Amendment analysis, this Court has noted that "[t]he reasonableness of any particular governmental activity does not necessarily or invariably turn on the existence of alternative 'less intrusive' means." Illinois v. Lafayette, 462 U.S. 640, 647 (1983). "A creative judge engaged in post hoc evaluation of police conduct can always imagine some alternative means by which the objectives of the police might have been (Footnote Continued)

In short, the Second Circuit has invaded the province of a local governing body, which had by means of an in-depth investigation devised guidelines best suited for the local conditions of Bandshell events. Without any evidence of restriction of expression, the Circuit Court, assuming the role of a regulatory body, has second-guessed that judgment under the guise of the "least intrusive" standard and has devised its own regulation. See Regan v. Time, Inc., 468 U.S. 641, 657 (1984) ("The less-restrictive-alternative analysis ... has never been a part of the inquiry into the

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(Footnote Continued)
accomplished." United States v. Sharpe, 470 U.S. 675, 686-687 (1984). Therefore, "[t]he logic of such elaborate less-restrictive-alternative arguments could raise insuperable barriers to the exercise of virtually all search-and-seizure powers." United States v. Martinez-Fuerte, 428 U.S. 543, 556-557 n.12. (1976).

validity of a time, place and manner regulation.")

(2)

The Second Circuit's approach is in direct conflict with the decisions of other circuits, thereby highlighting its failure to recognize that legislative or regulatory bodies enacting statutes or rules are more attuned to the problems of their locale and are in a far better position to make remedial determinations than a court. See, Schultz v. Fishby, 807 F.2d 1339, 1369 (7th Cir. 1986) (Coffey, dissenting), vacated, 818 F.2d 1284 (1987), aff'd, 822 F.2d 642 (1987), further consideration of the question of jurisdiction is postponed to the hearing of the case on the merits, 484 U.S. ____, 108 S. Ct. 692 (1988), rev'd, ___ U.S. ____, 56 LW 4785 (1988).

In Reeves v. McConn, 631 F.2d 377 (5th Cir. 1980), reh. den., 638 F.2d 762

(1981), an action was brought challenging a city ordinance regulating operation of sound amplification equipment. Appellees, who sought to disseminate certain political and educational views among the people of Houston, successfully argued in the District Court that the regulation prohibiting any sound amplification equipment "with an excess of twenty (20) watts of power in the last stage of amplification" was unconstitutional. The District Court used the "least restrictive means" standard as the basis for finding the provisions infirmed. Id. at 386.

The Court of Appeals for the Fifth Circuit rejected this approach noting that "the requirement that a statute be narrowly tailored is only one factor in answering the ultimate question whether the regulation is reasonable. Grayned, 408 U.S. at 116-117, 92 S. Ct. at 2303." Thus, a city is not

required to adopt the least restrictive means of regulation "no matter what the consequences"; rather, the reasonableness of its regulation will be viewed "in the light of less drastic means for achieving the same basic purpose. Shelton v. Tucker, 364 U.S. 479, 488, 81 S. Ct. 247, 252, 5 L. Ed.2d 231 (1960)." Reeves v. McConn, supra, 631 F.2d at 386. Nevertheless, the Circuit Court found the regulation unconstitutional because the City failed to offer evidence contrary to plaintiff's expert who testified that sound amplification in excess of 20 watts could be non-disruptive. Id at 387.

The Fifth Circuit also found administrative convenience a proper factor for choosing one means of regulation over another. Id. The wisdom of this approach is underscored when one contemplates the possible ramifications of the Court of Appeals' suggestion in the instant case of

pulling the plug at a crowded event at the Bandshell in order to reduce volume. Surely where the District Court in the instant case found no evidence that the City was unable to provide the proper mix under the guidance of the sponsor (A89), the administrative convenience of having a City-designated technician at the mixing board outweighs any theoretical limitation of expression, of which we note, petitioners failed to produce any evidence. In fact, the evidence adduced at trial showed that one year after the Guidelines were in place, no user of the Bandshell expressed dissatisfaction or complained that the sound provided was inadequate or unfaithful to artistic expression (498-499).

The Court of Appeals of the Fourth Circuit adopted the Fifth Circuit's approach in Jim Crockett Promotion, Inc. v. City of Charlotte, 706 F.2d 486 (4th Cir. 1983).

Plaintiffs, owners of and operators of a private general purpose sports and entertainment stadium, sought to restrain enforcement of the City's noise ordinance. The Court of Appeals found that, while amplified speech was within the protection of the First Amendment, municipalities may regulate the sound within reasonable limits. Id. at 491. The regulation must be (1) within the constitutional power of the State or its authorized subdivision, (2) it must further an important or substantial government interest, (3) the government interest must be unrelated to the suppression of free speech, and (4) the incidental restriction on an alleged First Amendment freedom should be no more than is essential to the furtherance of the governmental interest. Significantly, the Circuit Court did not hold that the governmental body must adopt the least

restrictive regulation, no matter the consequences. Instead, like Reeves, the Court held the "reasonableness" of the regulation should be determined "in the light of less drastic means of achieving the same purpose." Id.

(3)

Contrary to the standard of "reasonableness" in determining whether a content-neutral regulation is "narrowly tailored" is the holding in City of Wateska v. Illinois Public Admin. Council, 796 F.2d 1547 (7th Cir. 1986), aff'd without opinion, ___ U.S. ___, 107 S. Ct. 919 (1987), reh. den., ___ U.S. ___, 107 S. Ct. 1389 (1987). In Wateska, the City filed a complaint in state court seeking a declaratory judgment that an ordinance limiting door-to-door solicitation to between the hours of 9 a.m. and 5 p.m. was constitutional. The matter was removed to federal court. The Court of Appeals for the

Seventh Circuit found that based on the holding in City of Renton v. Playtime Theatres, supra, 106 S. Ct. at 925, a four-part test was developing for the consideration of cases involving time, place and manner restrictions. To sustain a time, place and manner restriction on First Amendment activities, the government must show that the restriction is (1) content-neutral, (2) serves a legitimate government objective, (3) leaves open ample alternative channels of communication, and (4) is narrowly tailored to serve the governmental objective. Id. at 1552.

Finding that the Supreme Court does not always spell out the "narrowly tailored" step as part of its standard for evaluating time, place and manner restrictions, the Seventh Circuit erroneously concluded that the "less-restrictive-means standard" is the most faithful to the Supreme Court approach.

Id. at 1553. The Circuit Court found that this Court has emphasized a need for precision in the regulation of the exercise of First Amendment rights and therefore, when analyzing whether a regulation is narrowly tailored, the government must show that the "less restrictive alternatives are inadequate to protect the governmental interest." Id. at 1554. Finding that the City of Wateska had less restrictive means to achieve the objectives of its ordinance, which included peace, quiet and privacy, the Circuit Court struck down the law. Id. at 1557. The Court did not discuss how its conclusion comported with the principle set forth in Clark or Albertini.[6]

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[6] While this Court affirmed Wateska, it did so without opinion, and thus did not depart from the consistency of its holdings in Clark and Albertini. Moreover, Chief Justice Berger and Justices White and O'Connor (Footnote Continued)

The Seventh Circuit reaffirmed its test recently in Schultz v. Frisby, supra, 807 F.2d at 1339. It bears noting that in its opinion, the Seventh Circuit claimed it had adopted the Eighth Circuit's less restrictive means standard in ACORN v. City of Frontenac, 714 F.2d 813, 818-819 (8th Cir. 1983), another case centered on a challenge to a city ordinance regulating the hours of canvassing. In Acorn, the Court held that since constitutional principles require the regulation to be narrowly drawn to further the legitimate government objective, the proponent must show that less restrictive

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(Footnote Continued)
dissented from the affirmance and would have "note[d] probable jurisdiction" because it was their view that the Circuit Court's less-restrictive analysis had never been a part of the inquiry into the validity of a time, place and manner regulation. City of Wateska v. Illinois Public Admin. Council, supra, 107 S. Ct. at 920.

alternatives would not meet the government's objectives. Id.

(4)

We believe that this is the appropriate case for this Court as to the proper standard to apply in determining whether an ordinance regulating speech is "narrowly tailored." The impropriety of the least restrictive, less intrusive approach is highlighted by the case at bar where a District Court has found absolutely no restriction of expression, but the Court of Appeals imposed its own view as to how to solve a local problem, as did the Court in Clark, despite the careful consideration and deliberation of the responsible agency, the New York City Parks Department, in promulgating sound regulations. The holdings of Wateska and ACORN show little concern for this Court's holdings in Clark and Albertini. Rock Against Racism reflects

the continued Circuit Court evasion of this Court's mandate in this area of First Amendment law. Further elucidation of this issue by this Court could put an end to this course of conduct and the conflict of views in the Circuit Courts. If the decision below is allowed to stand, the confusion and uncertaintly in the analysis of regulation of speech will continue unabated burdening the government decision-makers and the judiciary in performing their respective roles.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

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August 3, 1988

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88-226 (8)

Supreme Court, U.S.
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CLERK

No. 88-

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

BENJAMIN R. WARD, et al.,

Petitioners,

- against -

ROCK AGAINST RACISM,

Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, DATED JUNE 2, 1988

ROCK AGAINST RACISM,

Plaintiff-Appellant,

- against -

BENJAMIN R. WARD, in his official capacity as Police Commissioner for the City of New York; GEORGE SCARPELLI, in his official capacity as Chief of Operations for Department of Parks; SHELDON HOROWITZ, in his official [capacity] as Special Events Director for the Department of Parks; ROBERT RUSSO, in his official capacity as Assistant Parks Commissioner for Citywide Services, New York City Department of Parks and Recreation; JOSEPH KILLIAN, in his official capacity as Program Director for the Mall Bandshell of the Bethesda Terrace area of Central Park in the City of New York, Department of Parks and Recreation; MAYOR EDWARD KOCH, in his official capacity as the Mayor of the City of New York; and THE CITY OF NEW YORK,

Defendants-Appellees.

Before FEINBERG, Chief Judge, PRATT, Circuit Judge and DORSEY, District Judge.*

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* Honorable Peter C. Dorsey, United States District Judge for the District of Connecticut, sitting by designation.

Appeal from orders of the United States District Court for the Southern District of New York, Charles S. Haight, Jr., Judge, declining to enjoin defendants from enforcing a Sound Amplification Guideline for events held at the Naumberg Bandshell in Central Park, New York City.

Affirmed in part, reversed in part, and remanded with direction to modify injunction.

James H. Fosbinder, Tucson, AZ (Julie Fosbinder, of Counsel), for Plaintiff-Appellant.

Peter L. Zimroth, NY, (Corporation Counsel for the City of New York, Larry A. Sonnenshein, Julian L. Kalkstein, of Counsel), for Defendants-Appellees.

DORSEY, District Judge

This appeal presents a question of balancing a first amendment right against a municipality's exercise of its police powers.

Facts

The Naumberg Bandshell is an open air public amphitheater on the west side of Central Park in the City of New York. Appellant, Rock Against Racism ("RAR"), is "an unincorporated association which describes itself as 'dedicated to the espousal and promotion of antiracist views.'" Rock Against Racism v. Ward, 658 F. Supp. 1346, 1348 (S.D.N.Y. 1987). Appellees are the City, its Mayor, police and park officials. All individuals are sued in their official capacities only.

Since 1979, RAR has sponsored, at the bandshell, an annual program of speakers representing groups opposed to racism, interspersed with musical groups. The City requires a permit for such use. In March 1986, after litigation between the City and RAR over the latter's attempts to obtain permits for the bandshell, the city's

Department of Parks issued "Use Guidelines" to govern the granting of permits for and the staging of events at the bandshell. Sponsors must comply with the guidelines to obtain permits. Appellant brought suit challenging the guidelines as facially invalid as a prior restraint on activity protected by the first amendment. Judge Haight, after a five-day trial, permanently enjoined enforcement of some of the guidelines, but declined to enjoin the Sound Amplification Guideline ("SAG") at issue in this appeal. Rock Against Racism, 658 F. Supp. at 1360-61. The court later amended and clarified the injunction in an unpublished memorandum opinion and order in respects not relevant here. Memorandum Opinion and Order, No. 85 Civ. 3000-CSH (S.D.N.Y. Apr. 30, 1987) ("Memorandum"). Appellant challenges these rulings only to the extent

of the court's failure to enjoin enforcement of the SAG.

Under the SAG, all sponsors of events at the bandshell must use a sound system and sound engineer supplied by the City, and no other equipment.[1] The City

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[1] The Use Guidelines provide as follows:

SOUND AMPLIFICATION

To provide the best sound for all events Department of Parks and Recreation has leased a sound amplification system designed for the specific demands of the Central Park Bandshell. To insure appropriate sound quality balanced with respect for nearby residential neighbors and the mayorally decreed quiet zone of Sheep Meadow, all sponsors may use only the Department of Parks and Recreation sound system. DEPARTMENT OF PARKS AND RECREATION IS TO BE THE SOLE AND ONLY PROVIDER OF SOUND AMPLIFICATION, INCLUDING THOUGH NOT LIMITED TO AMPLIFIERS, SPEAKERS, MONITORS, MICROPHONES, AND

(Footnote Continued)

contracts with a private firm which supplies a sound system and technician approved by the City for each event. Thus, the volume, the sound "mix," and the overall sound quality are under the physical control of the city-supplied technician who answers to

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(Footnote Continued)
PROCESSORS.

> Clarity of sound results from a combination of amplification equipment and a sound technician's familiarity and proficiency with that system. Department of Parks and Recreation will employ a professional sound technician [who] will be fully versed in sound bounce patterns, daily air currents, and sound skipping within the Park. The sound technician must also consider the Bandshell's proximity to Sheep Meadow, activities at Bethesda Terrace, and the New York City Department of Environmental Protection recommendations.

City of New York Parks & Recreation, Use Guidelines for the Naumberg Bandshell in Central Park (March 21, 1986).

officials of the Department of Parks. During the musical program, this sound engineer presides at a "mixing board" which controls inputs (sound levels, bass, treble, etc.) from each instrument, performer, or microphone. By varying the sound mix, the sound engineer can control what the audience hears over the speaker system, including both the volume and the aesthetic result or sound quality. The district court found that the city's practice is to allow the sponsor to designate a representative to direct the city's engineer in controlling the sound mix while the city's park officials direct the engineer's control of the volume.[2]

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[2] The SAG itself does not articulate this procedure, but the court's opinion, Rock Against Racism, 658 F. Supp. at 1352-53, and its subsequent memorandum opinion and order clarifying the injunction, Memorandum at 2-3, read the procedure into the SAG as (Footnote Continued)

The net effect of the trial court's orders, as they are challenged in this appeal, is that the SAG was found to be lawful to the extent that it requires use of a city-provided sound system and a city-employed technician to operate it subject to the direction of a representative of the musical performers as to the sound mix, but also subject to the City employee's sole determination when the volume level is excessive. RAR's appeal claims that the SAG, as thus enforced, violates its first amendment right of free expression and must be invalidated. Appellees contend that the SAG, as construed by the district court, is a proper exercise of police power.

(Footnote Continued)
a requirement for validity. The finding that the City followed such a practice is not challenged on appeal.

Discussion

There is no dispute but that the bandshell, a place traditionally "used for the purposes of assembly, communicating thoughts between citizens, and discussing public questions," is a public forum. Hague v. Committee For Industrial Organization, 307 U.S. 496, 515 (1939) (opinion of Roberts, J.); Wolin v. Port of New York Authority, 392 F.2d 83, 88 (2d Cir.), cert. denied, 393 U.S. 940 (1968). As such, the city's regulation of the bandshell's use is subject to the first amendment's limitations on government action which infringes upon the freedom of expression. "In such places, the government's ability to permissibly restrict expressive conduct is very limited." United States v. Grace, 461 U.S. 171, 177 (1983). This protection extends to the production and transmission of musical performances, as well as speech. See

Cinevision Corp. v. City of Burbank, 745 F.2d 560, 567 (9th Cir. 1984), cert. denied, 471 U.S. 1054 (1985); Davenport v. City of Alexandria, 710 F.2d 148, 150 n.6 (4th Cir. 1983) (en banc); Goldstein v. Town of Nantucket, 477 F. Supp. 606, 608 (D. Mass. 1979); see also Tele-Communications of Key West, Inc. v. United States, 757 F.2d 1330, 1337 (D. C. Cir. 1985) (packaging and transmitting television programs, even without original production, protected by first amendment).

Under certain circumstances, the City has the right to regulate expressive conduct which has harmful effects on others. See Members of the City Council v. Taxpayers for Vincent, 466 U.S. 789, 804 (1984); see also City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 50 (1986) ("a city's 'interest in attemption to preserve the quality of urban life is one that must be

accorded high respect'") (citation omitted); Clark v. Community for Creative Non-Violence, 468 U.S. 288, 297 (1984) (where parks would be "more exposed to harm without the sleeping prohibition than with it," ban on sleeping in parks is a reasonable regulation). Content neutral time, place and manner regulations are permissible so long as they are narrowly tailored to serve a substantial government interest and do not unreasonably limit alternative avenues of expression. Community for Creative Non-Violence, 468 U.S. at 295; see City of Renton, 475 U.S. at 50; Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976) (reasonable time, place and manner restrictions on commercial speech are permissible provided they are content neutral, serve a significant governmental interest, and leave open ample

alternative channels). However, the method and extent of such regulation must be reasonable, that is, it must be the least intrusive upon the freedom of expression as is reasonably necessary to achieve a legitimate purpose of the regulation. United States v. O'Brien, 391 U.S. 367, 377 (1968); Legi-Tech Services, Inc. v. Keiper, 766 F.2d 728, 735 (2d Cir. 1985). See United States v. Albertini, 472 U.S. 675, 688-89 (1985) ("an incidental burden on speech is not greater than essential, and therefore is permissible under O'Brien, so long as the neutral regulation promotes a substantial government interest that would be achieved less effectively absent the regulation").

Here, the city's express purpose is to prevent the noise generated at the bandshell from intruding offensively upon those who do not choose to attend or hear the musical

presentation.[3] Noise levels may be regulated. Grayned v. City of Rockford, 408 U.S. 104, 116 (1972); Kovacks v. Cooper, 336 U.S. 77, 87-89 (1949); cf. Reeves v. McConn, 631 F.2d 377, 386-87 (5th Cir. 1980) (holding that City may establish maximum wattage limits for amplified sound, but declaring ordinance unconstitutional where City failed to justify 20-watt limit), reh'g denied, 638 F.2d 762 (1981). The City could lawfully accomplish this purpose by establishing and enforcing

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[3] The district court found that the City had a second objective in implementing the SAG: to ensure the quality of sound at bandshell events. Rock Against Racism, 658 F. Supp. at 1352. However, the court justified its conclusion that the SAG was valid with reference only to the city's noise control objective. No determination was made of the weight to be given the city's interest in quality control, nor was there a finding that this objective could not be effected by other, less restrictive means.

reasonable limits on the volume, or noise level, emanating from the bandshell. See, e.g., Jim Crockett Promotion, Inc. v. City of Charlotte, 706 F.2d 486, 493 (4th Cir. 1983) (upholding ordinance limiting decibel levels as measured by standard metering techniques). The City could impose a reasonable limit on the maximum power of the amplification equipment to be used. See Reeves, 631 F.2d at 386-87.

Appellant makes no claim that the volume level has been set below that necessary to carry its message. Appellant does assert that the volume limitations allow the City to discriminate against different sponsors by varying the volume permitted. We do not think the regulations are impermissible on their face -- they imply that listeners in the bandshell area should be able to hear the performance, but others should not necessarily be obliged to listen to

it. If the regulations are being unconstitutionally applied in a discriminatory manner, appellant may bring an appropriate suit. Appellant also claims that the mix of the input from the performers and their several instruments is essential to the artistic presentation and interpretation and that the choice of sound system, its quality, components, and capacity are essential factors in that presentation, as is the technician who operates it. These claims are not controverted in the record. Appellant argues that the SAG impinges on its protected interest in controlling the sound mix of its concerts.[4] The City makes no

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[4] The district court considered RAR's first amendment interest in using its own sound system and engineer to be attenuated or nonexistent. Rock Against Racism, 658 F. Supp. at 1353. However, RAR and other sponsors clearly have a protected interest in
(Footnote Continued)

claim that it may regulate the sound mix, but only the volume. The SAG requires use of the city's sound system and technician, who not only controls the volume emitted from the speaker system to limit the measurable noise level beyond a specified distance from the bandshell, but who also controls the sound mix. Thus, the City must demonstrate that its regulation of the volume is reasonably accomplished by the required use of the city's system and the city's operator and that the requirements do not unnecessarily intrude on the right of artistic expression.

(Footnote Continued)
directly controlling the sound mix and the choice of the system as an essential element of the artistic presentation. See Cinevision Corp., 745 F.2d at 568-69 (discussing role of concert promoters as protected by first amendment).

The city's argument for requiring the use of its system and technician refers only to the noise level, the need for a quality system, and the need for compatibility and familiarity between the technician and the system provided. However, restriction to use of the city's choice of sound systems is not shown to be necessary to control noise levels. Any system has a volume control. The quality of the system has a limited relation to the regulation of volume.[5] Nor has the technician's operating knowledge

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[5] While the court below found that the city has a legitimate interest in sound quality, it did not address this interest as a justification for the SAG requirement that only the city's system and technician be used. Because, on this record, the city's interest in sound quality has not been shown to justify the SAG requirements, we need not consider RAR's argument that a government desire to maintain the quality of expression can never be a "legitimate interest" which may justify restrictions on the manner of the expression.

been shown to be essential to the regulation of volume. Indeed, another city official monitors the noise level and instructs the technician as necessary to keep the broadcast volume within the permitted level. Rock Against Racism, 658 F. Supp. at 1352.

The city's regulation is valid only to the extent necessary to control volume. Without ruling on the constitutionality of any of the following options, we note that volume control can be exercised by a means for determining when the broadcast volume exceeds the appropriate levels. The sponsor's technician at the control board can then be directed to adjust the controls to keep the volume below such levels or perhaps a city technician can be vested with authority over and ability to control only excess volume. It also may be achieved by a volume limiting device in the possession or control of the city employee or by other

means. The city has not shown that the use of devices to limit sound output is not technologically feasible. See Legi-Tech, Inc., 766 F.2d at 736 (remanding for inquiry into feasible alternatives). Such would be well within the city's right and would not violate the performers' first amendment rights by intruding on their choice of sound systems and their decisions on sound mix. It would not involve the city, as does the SAG, in the choice or supply of sound systems nor the operating technician. The city rejected the alternatives of negotiating a decibel level for each event, with the sponsor, or allowing sponsors to use their own sound systems operated by the city's technician.

While the city may properly regulate the broadcast volume, it has not shown, nor has a record been established from which it could be found, that the requirement of the

use of the city's sound system and technician was the least intrusive means of regulating the volume. The sound system and its operation are not questioned as an element of the artistic performance and thus are protected as a means of artistic expression. The city has not shown a justification for intrusion upon that right of expression, nor has the city shown that such intrusion is reasonably necessary to control the volume.

The city demonstrated, and the trial court found, that performing groups have not in the past proven cooperative in adhering to prescribed sound levels. There is nothing in the record to suggest that the city cannot devise methods to control the volume, even in the face of non-cooperation, without requiring the use of a designated sound system operated by the city's

technician.[6] In the highly subjective realm of music, legitimate regulation of noise levels does not justify standardization. The required use of the city's system and technician forces each performer and sponsor to filter its sound quality, tone, mix, and other aesthetic factors through the city's technician and sound system. On the present record, such requirements are not necessary to control volume and are not otherwise shown to meet the standard of the least intrusive restriction on first amendment rights. Therefore, to the extent the SAG requires the use of only the city-provided

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[6] As a last resort if such methods fail, the plug can be pulled on the sound to enforce the volume limit. While this would terminate the particular non-complying sponsor's concert, it is a reasonable alternative to restriction on the expressive rights of sponsors who routinely comply with reasonable volume limits.

sound system operated by the city's designated technician, it is an unnecessary intrusion on, and a violation of, the first amendment right of the performers.

Accordingly, to the extent the trial court's judgment sustained the right of the city to limit volume of performances broadcast from the bandshell to a level otherwise specified as reasonable, it is affirmed. To the extent it upheld the SAG requirement of the use of a sound system furnished by the city and operated by a technician designated by the city, it is reversed. The judgment of the trial court is affirmed in part and reversed in part and remanded for the purpose of entering a modified order consistent with this opinion.

MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT, DATED APRIL 6, 1987

ROCK AGAINST RACISM,

Plaintiff,

-against-

BENJAMIN R. WARD, in his official capacity as Police Commissioner of New York; GEORGE SCARPELLI, in his official capacity as Chief of Operations for Department of Parks; SHELDON HOROWITZ, in his official capacity as Special Events Director for the Department of Parks, ROBERT RUSSO, in his official capacity as Assistant Parks Commissioner for Citywide Services, New York City Department of Parks and Recreation; JOSEPH KILLIAN, in his official capacity as Program Director for the Mall Bandshell of the Bethesda Terrace area of Central Park in the City of New York, Department of Parks and Recreation; MAYOR EDWARD KOCH, in his official capacity as the Mayor of the City of New York; and the City of New York,

Defendants.

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HAIGHT, District Judge:

The plaintiff in this action, Rock Against Racism ("RAR"), is an unincorporated association which describes itself as "dedicated to the espousal and promotion of anti-racist views." Defendants are the City of New York, Edward I. Koch, Mayor of the City of New York, Police Commissioner Benjamin Ward, and four officials of the City's Department of Parks and Recreation (George Scarpelli, Sheldon Horowitz, Joseph Killian and Robert Russo). All individual defendants are sued in their

official capacities only. The defendants are sometimes collectively referred to as "the City."

Since 1979, RAR has sponsored a yearly "musical/political event" at the Naumberg Bandshell in Central Park ("the Bandshell"), generally on a weekend in early May. Since 1985, RAR's attempts to obtain official permission to hold their May event have resulted in litigation before this court.[1]

While other disputes exist, the main bones of contention have been the City's contention that RAR's amplified sound has been excessively loud and its sponsor's conduct generally uncooperative; and RAR's

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[1] RAR's action in this Court is brought pursuant to 42 U.S.C. section 1983, alleging deprivation of rights guaranteed by the First and Fourteenth Amendments to the Constitution. Jurisdiction is proper under 28 U.S.C. section 1332.

resistance to what it perceives as City interference and obstructionism.

RAR's original complaint, filed on April 18, 1985, sought injunctive relief. The parties settled their differences, at least for the moment, and the May, 1985 event was held.

In March 1986 the Department of Parks issued "Use Guidelines" for the Bandshell and, in late April 1986, RAR challenged the application of those guidelines to their May 4, 1986 event. That challenge was brought on by order to show cause before this Court, and on May 1, 1986, having considered the opposing affidavits and heard such testimony as time pressure allowed, I issued a Memorandum Opinion and Order partially granting and partially denying

RAR's request for a preliminary injunction.[2] Familiarity with that opinion is assumed.

RAR filed an Amended Complaint on November 5, 1986 seeking a declaratory judgment "striking" the challenged regulations and also seeking compensatory and punitive damages. Defendants filed an Answer to the Amended Complaint on November 28, 1986. Following discovery, the Court heard approximately five days of testimony on RAR's claims for a permanent injunction against the Use Guidelines, and for compensatory and punitive damages. I consider the prior proceedings as part of the trial record. Rule 65(a)(2), F.R.Civ.P.

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[2] An appeal taken by the City to the May 1, 1986 Order was dismissed as moot, RAR's May 1986 event having taken place in the interim.

While the Amended Complaint roamed somewhat farther afield, the parties were directed to file pre-trial proposed conclusions of law supported by authority. I limit this opinion to those provisions of the Guidelines attacked in RAR's proposed conclusions.

For the reasons set forth below, I issue a permanent injunction enjoining defendants from applying certain portions of the Use Guidelines, deny an injunction as to others, and deny plaintiff's claims for compensation and punitive damages.

The Use Guidelines

The Use Guidelines ("the Guidelines") challenged by RAR were primarily authored by Joseph Killian, the first Program Director for the Mall, Bandshell, and Bethesda Terrace area of Central Park. Drafting the Guidelines was one of Mr. Killian's first responsibilities in his new job: he was hired

in January 1986, and the Guidelines were promulgated under authority of the Commissioner of Parks on March 21, 1986.

The Guidelines are contained in a six-page document typed on Parks Department letterhead and captioned "Use Guidelines for The Naumberg Bandshell in Central Park." The Guidelines set out Parks Department policy on twelve subjects: (1) Permits, (2) Hours/Dates of use, (3) Attendance, (4) Sound Amplification, (5) Insurance, (6) Vehicles, (7) Concession of Goods, (8) Revenue, (9) Safety, (10) Portable Toilets, (11) Cleanup, and (12) Evaluation.[3]

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[3] The Use Guidelines were marked as Defendant's Exhibit F at the trial of this action. An additional subject area (distribution of literature) was addressed by the original Guidelines, but was later struck out by the Parks Department on counsel's advice that it represented an unconstitutional burden on Bandshell user's First Amendment (Footnote Continued)

RAR challenges seven of the areas addressed by the Guidelines: Permits, Hours/Dates of use, Attendance, Sound Amplification, Insurance, Vehicles and Revenue. Each of the challenged subject areas is discussed more fully below.

On the first page of the six-page Guidelines, their purpose is described as being to assist sponsors of events at the Bandshell "in understanding their responsibilities; to prevent overuse, crowding, security problems and excessive noise; and to avoid conflicts with other

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(Footnote Continued)
rights. The struck paragraph is located on page four of Exhibit F. Testimony at trial indicated that the Parks Department is currently endeavoring to formally modify the Guidelines to reflect the absence of this subject area. Counsel for the City represented at trial, and I accept, that no effort will be made to restrict the distribution of literature at Bandshell events.

users of Central Park." Those who intend to sponsor an event at the Bandshell are informed that if their proposed event fails to "meet" the Guidelines, they should "consider using an alternate site." Despite the advisory flavor of these introductory remarks, the parties agree that the Guidelines are intended as enforceable regulations. Events that conflict with the Guidelines will not be permitted at the Bandhsell.[4]

RAR contends that the Guidelines are facially invalid, claiming that they operate as a prior restraint on the right of free speech. The evidence adduced at trial also

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[4] See the Evaluation section of the Guidelines, where sponsors of events are informed that "FAILURE TO FOLLOW THESE GUIDELINES CAN ... PROVIDE REASON TO DENY THE SPONSOR ... ANY AND ALL FUTURE BANDSHELL PERMIT APPLICATIONS."

requires consideration of certain of the Guidelines as applied to RAR.

Discussion

A. First Amendment Law for Public Forums

The First Amendment to the Constitution, as applied to the states through the Fourteenth Amendment, prohibits public authority from, inter alia, abridging the freedom of speech, or the right of the people peaceably to assemble, in places customarily used as forums for public speech. Central Park is unquestionably such a public form.[5] Justice Roberts' oft

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[5] It is possible that some facilities at Central Park do not fall within the definition of a "public forum." In the present action, however, defendants have not suggested that the Naumberg Bandhsell is not a public forum for First Amendment purposes. See Wolin v. Port of New York Authority, 392 F.2d 83, 90 (2d Cir. 1968) (setting forth criteria for deciding whether a particular place is a public forum).

quoted statement Hague v. C.I.O., 307 U.S. 496, 515-16, (1938) while establishing this proposition, also provides an excellent backdrop for the present controversy:

> "Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights and liberties of citizens. The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied."

The tension between an individual's relative (not absolute) freedoms of expression and assembly and public concerns of comfort, convenience, peace and good order is further defined in subsequent

Supreme Court cases. Despite plaintiff's faint suggestion to the contrary, we deal in this case with content-neutral regulations. "Expression, whether oral or written or symbolized by conduct, is subject to reasonable time, place and manner restrictions." Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984). "'[C]ontent-neutral' time, place and manner regulations are acceptable so long as they are designed to serve a substantial government interest and do not unreasonably limit alternative avenues of communication." City of Renton v. Playtime Theaters Inc., 475 U.S. 41 (1986).

Once a governmental regulation is shown to impinge upon the First Amendment rights of an individual or group, government bears the burden of showing both the validity of the interests sought to be protected by the regulation, and the absence

of less restrictive alternatives. Perry Education Assn. v. Perry Local Educators' Assn., 460 U.S. 37 (1983); Heffron v. International Society for Krishna Consciousness, 452 U.S. 640 (1980); Cox v. New Hampshire, 312 U.S. 569 (1941); Schneider v. State, 308 U.S. 147 (1939). The challenged regulation will be held unconstitutional unless the government proves that it is "narrowly tailored to further the State's legitimate interest." Grayned v. City of Rockford, 408 U.S. 104, 116-17 (1972). See also Eastern Connecticut Citizens Action Group v. Powers, 723 F.2d 1050 (2d Cir. 1983).

For First Amendment purposes, "speech" extends to musical expression, as well as the spoken word. Cinevision Corp. v. City of Burbank, 745 F.2d 560 (9th Cir. 1984).

Against these general considerations, I turn to the particular regulations at bar.

B. Sound Amplification

The Guideline section regarding Sound Amplification declares that the "DEPARTMENT OF PARKS AND RECREATION IS TO BE THE SOLE AND ONLY PROVIDER OF SOUND AMPLIFICATION." This declaration entails two discrete requirements: first, that sponsors use a sound amplification system provided by the New York Sound Company ("New York Sound"), a vendor selected by the Parks Department; and second, that the sound amplification system be operated by a technician employed by New York Sound.

In my May 1, 1986 Opinion, I preliminarily enjoined the defendants from enforcing these requirements against RAR. In doing so, I noted that First Amendment "protection extends not only [to] the words

and songs presented [by RAR,] but also [to] the sound which actually emanates from the amplification system itself and who controls it."

In preliminarily enjoining the City from enforcing the sound amplification regulations in respect of RAR's May 1986 event, I acted on the basis of a relatively sketchy record. All that emerged with clarity was that the City intended to impose upon RAR a sound system of unknown quality, seemingly under the sole control of an individual owing his allegiance to a City contractor and not to RAR as sponsor of the event. These circumstances, in my view, entitled RAR to preliminary injunctive relief at that time and with respect to that event.

The plenary trial on plaintiff's motion for a permanent injunction, now concluded, permits more detailed findings of pertinent facts, and places RAR's constitutional

challenge to the sound amplification regulations in perspective.

The Naumberg Bandshell has become one of the most popular and heavily used outdoor entertainment facilities in Central Park. The Bandshell "season" begins in mid-Spring and runs until early Fall. Prior to 1986, a number of Parks Department branches and other City agencies were involved in processing applications for, and supervising the use of, the Bandshell. The Bandshell lies at the northern end of the Mall, between the Mall and the Betheseda Terrace and Fountain. The Bandshell itself consists of a raised stage extending out from an acoustic shell, which faces a well-defined paved "concertground", which is in turn surrounded by grassy areas, slight elevations, and trees. To the west of the concertground lies the Sheep Meadow, and

ultimately the towers and battlements of Central Park West.

In January 1986 Joseph Killian was hired to be the Bandshell's first program director. Killian had experience as a performer and a producer of outdoor entertainments. In addition to drafting the guidelines which form the subject matter of this litigation, Killian also undertook a search for a sound amplification vendor with whom the City could contract to furnish amplification at the Bandshell. For this purpose Killian retained the services of an experienced sound consultant, Gary Floyd. Killian and Floyd gave evidence at the trial.

After researching the Bandshell's amplification requirements and canvassing local sound companies, Floyd recommended to Killian that the City retain New York Sound. Killian accepted that recommendation. It is apparent that both Killian and Floyd were

motivated by a desire to obtain top-flight sound equipment and experienced operators. Quality, not price, was stressed.

I find that in retaining New York Sound as its vendor, the City had two objectives: to place control of the volume in its hands; and to ensure the quality of sound at Bandshell events.

RAR does not accept the legitimacy of the second objective professed by Killian. Indeed, at oral argument counsel for RAR seemed to suggest that the City's entire process of retaining a sound company and issuing guidelines was an effort to avoid a purported settlement of its disputes with RAR in May 1985. This perception does not square with the evidence. Killian and Floy worked hard to ensure quality sound at the Bandshell as well as ultimate control over the volume level.

The RAR May 1986 event, the first of the 1986 Bandshell season, was (by virtue of this Court's preliminary injunction) the only event that season not amplified by the New York Sound system and engineer. The other 50 to 60 events, which ran the full cultural gamut from grand opera to salsa to reggae, all used the New York Sound system. Despite understandable initial misgivings on the part of groups accustomed to arranging for their own sound amplification, Killian testified, and I find, that the sponsors of 1986 events at the Bandshell were uniformly please with the quality of the amplified sound. Indeed, at least one sponsor thereafter retained New York Sound at other events.

The evidence shows that amplified sound at a concert consists of two basic components: sound quality or "mix," and sound volume. A series of stage

microphones are placed throughout the performers. The sounds picked up by these microphones are fed into a "mixing board" at which New York Sound's engineer presides. His adjustments at the board control the mix of sound which is then amplified through a series of speakers. The City's practice for events at the Bandshell is to give the sponsor autonomy with respect to the sound mix: balancing treble with bass, highlighting a particular instrument or voice, and the like. The New York Sound engineer does all that he can to accommodate the sponsor's desires in those regards. For the New York Grand Opera performances, New York Sound "patched" in to its system particular microphones which Maestro LaSelva preferred and New York Sound did not have in its inventory.

It is the fact that the New York Sound engineer can control the volume of the

amplification, presumably by turning a knob or knobs. However, Killian, who attends most if not all of the Bandshell events, makes it a practice to confer with the sponsor if any questions of excessive sound arise, before taking any corrective action.

The City's concerns with respect to sound generated by Bandshell events are that the sound amplification be sufficient to reach all listeners within the defined concertground; but that the sound not extend unnecessarily beyond the listening area into adjoining sections of Central Park, where other persons might be pursuing other forms of recreation. The City is also concerned with excessive sound annoying residents of buildings which adjoin the park. The RAR concerts of 1985 and 1986 generated a number of complaints from such residents.

That the City has a legitimate governmental interest in controlling excessive sound cannot be gainsaid. A city's "interest in attempting to preserve the quality of urban life is one that must be accorded high respect." City of Renton supra, citing and quoting Young v. American Mini Theatres, Inc., 427 U.S. 50, 71 (1976). Excessive noise is a recognized threat to the quality of urban life. "The reduction of noise, particularly in a noise polluted City like New York, is a particularly compelling government interest." Weil v. McClough, 618 F.Supp. 1294, 1296 (S.D.N.Y. 1985). Justice Marshall put it succinctly in Grayned, supra, 408 U.S. at 116: "if overamplified loud speakers assault the citizenry, government may turn them down."

The City has undertaken to regulate noise in its parks by general Rules and

Regulations, D.Ex.G at trial, which provide in Section 15(a):

> "No person shall make or cause any excessive or unusually loud noise which disturbs, injures or endangers the comfort, peace, health or safety of any person or disturbs or causes injury to plant or animal life, or damage to business or property."

This regulation may not be challenged for unconstitutional vagueness. Cf. Kovacs v. Cooper, 336 U.S. 77 (1949) (ordinance forbidding amplification of "loud and raucous noises" upheld).

Sponsors of events at the Bandshell are entitled under the First Amendment to content-neutral regulations which guarantee them a level of sound amplification reasonably necessary to carry their message to the outer boundaries of the audience area. However, a user has no right, First Amendment or otherwise, to turn up the volume as loud as it wishes. The Supreme

Court struck the amplification balance in Kovacs at 81-82:

> "Unrestrained use throughout a municipality of all sound amplifying devices would be intolerable. Absolute prohibition within municipal limits of all sound amplification, even though reasonably regulated in place, time and volume, is undesirable and probably unconstitutional as an unreasonable interference with normal activities."

And again at 87:

> "Opportunity to gain the public's ears by objectionably amplified sound on the streets is no more assured by the right of free speech than is the unlimited opportunity to address gatherings on the streets." (footnote omitted)

I accept that RAR has a First Amendment right to the use of a sound amplification system capable of producing the quality of sound it desires, and the level of sound necessary to reach throughout the audience area. I do not detect a First Amendment right to own the sound amplification system used. The City's implementation of the Bandshell guidelines

provides for a sound amplification system capable of meeting RAR's technical needs and leaves control of the sound "mix" in the hands of RAR. Nothing further is required by the First Amendment.

RAR's interest in using its own equipment and sound engineer is, in the circumstances revealed by the evidence, "attenuated" at best, cf. Hoffman Estates v. Flipside, Hoffman Estates, 455 U.S. 489, 496 (1982), and obviously cannot be justified by a desire to engage in unrestrained and excessive noise, which government may validly regulate.

The sound amplification regulations are sufficiently narrowly tailored to further a legitimate state interest. The evidence shows that prior efforts on the part of the Parks Department's representatives to reduce RAR's sound levels have been non-availing and confrontational. Directing a New York

Sound Company technician to turn down the sound in case of need is less intrusive than pulling the plug, which evidence at trial indicated was the City's sole means of enforcing the general sound regulations prior to promulgation of the Guidelines.

I conclude that the sound amplification guidelines are constitutional because they do not impinge upon a protected right. Even if some slight interest in using familiar equipment exists, the guidelines are narrowly tailored to further a legitimate governmental interest.

One can hypothesize an unconstitutional application of the amplification guidelines to a particular sponsor such as RAR. Arbitrary reduction of sound level below that necessary to carry RAR's message to the Bandshell audience would be an example. However, on this record RAR's challenge must be facial, which means in this context

"a claim that the law is 'invalid in toto - and therefore incapable of any valid application.'" Hoffman Estates, supra, at 494 n. 5, citing and quoting Steffel v. Thompson, 415 U.S. 452, 474 (1974). Theoretical possibilities that a municipality may at a future time enforce a valid ordinance in an unconstitutional manner do not give rise to a present constitutional claim. Id. 455 U.S. at 503 n. 21.

Accordingly, RAR's constitutional challenge to the sound amplification provisions of the Bandshell guidelines fails.

C. Permits and Fees

The guidelines require Bandshell users to obtain permits. Certain fees are imposed. The provisions RAR challenges read as follows:

> "PERMITS
>
> Sponsors planning to use the Naumburg Bandshell must obtain the following permits:

1) Special Event Permit-Available from: Bandshell Program Director. There is a non-refundable processing fee, minimum $50, maximum $100. A cleanup bond must also be posted. A liability [sic] may be necessary.

2) Central Park Bandshell Permit - Available from: Bandshell program Director, The Arsenal Rm. 103, 830 Fifth Ave., N.Y., N.Y. 10021. The Department of Parks and Recreation is the sole and only provider of sound amplification. A user fee of $100 per performance hour, plus a one hour sound check is charged. This fee is due within seven days of receipt of a signed Bandshell Permit. It must be payed [sic] with a certified check or money order (no personal checks or cash) made payable to Cultural Council Foundation/Concert Fund."

3) Vehicle Permits - Available from: Bandshall Program Director (SEE ABOVE). There is no fee for vehicle permits.

"A liability may be necessary" as stated in subparagraph (1) means, as the body of the Guidelines makes clear, "a liability policy may be necessary." The issue of liability insurance is discussed separately infra.

First Amendment cases sanction the imposition of permit or license requirements

as prerequisites to speech in public forums. Local authorities have a valid interest in advance notice of public events, "to assure proper police protection and minimal inconvenience to the general public.... Licensing fees used to defray administrative expenses are permissible, but only to the extent necessary for that purpose." Eastern Connecticut Citizens Action Group, supra, at 1056.

When an application to use public property necessarily generates bureaucratic processing, communications and meetings, a "detailed time and motion study" is not required to prove that the cost to the City equals or exceeds the fee. United States Labor Party v. Codd, 391 F.Supp. 920, 921 (E.D.N.Y. 1975), reversed on other grounds, 527 F.2d 118 (2d Cir. 1975).

A fee requirement involving a First Amendment right must be "closely

scrutinized" to see whether it is reasonably necessary to a legitimate goal. Bullock v. Crater, 405 U.S. 134, 144 (1972). However, the rule in the Second Circuit is that a fee which does not exceed the cost to the City is reasonable and enforceable, in the absence of proof of the applicant's indigence "so pervasive as to make payment of even this modest fee beyond its reach." Codd, supra, at 527 F.2d 119; Eastern Connecticut Citizens Action Group, supra, at 1056.

In Invisible Knights of the Ku Klux Klan v. City of West Haven, 600 F.Supp. 1427 (D.Conn. 1985), the court appears to regard permit fee regulations as facially invalid if they do not specifically exempt indigents. Id. at 1435. I do not read the Second Circuit cases that way. A fee required of all users is presumptively valid. If challenged, the municipality must demonstrate "its necessity as a means of

offsetting expenses associated with applications for access to property under its control." Eastern Connecticut Citizens Action Group at 1056. If that burden is met, the applicant must plead and prove inability to pay.

Viewed in the light of these authorities, the processing fee is constitutional. The regulation provides for a fee of "minimum $50, maximum $100." In practice, the City looks to the predicted attendance given by the sponsor on the application. If that attendance is between 1000 and 3000 people, $50 is charged; from 3001 to 4000 $75 is charged; and on an application predicting an attendance in excess of 4000 the sponsor is charged $100 for processing. Killian, Tr. 543.

RAR - somewhat optimistically, it would seem - regularly predicts crowds in excess of 5000 at its event. A number of musical

groups participate. A significant number of vehicle arrangements must be made. A number of offices and agencies are necessarily concerned with a gathering of this size. The evidence makes it clear that intra-agency meetings are necessary together with meetings with representatives of the sponsor. I find, just as Judge Weinstein did in Codd, supra, that the actual cost to the City in processing such an application undoubtedly exceeds $100.

The "user fee" for the City-provided sound system "of $100 per performance hour, plus a one hour sound check" does not fare as well. Although in the preceding section of this Opinion, I have sustained against facial constitutional attack the City's right to require sponsors to use the New York Sound System, the Second Circuit cases make it clear that the City cannot recoup from a First Amendment user an

amount in excess of the costs actually incurred by the City with respect to that use. The evidence shows that under its contract with New York Sound the City is billed $400 for each event New York Sound services at the Bandshell, regardless of duration. A six-hour RAR event, when coupled with a one hour sound check, would result in a charge of $700: almost twice the cost incurred by the City under its contract with New York Sound. This fee is facially invalid. I need not theorize upon what different sound user fee arrangement might pass constitutional muster.

The required cleanup bond is facially valid. I find from the evidence that failure of a sponsor to dispose of event-generated litter imposes direct overtime costs upon the Parks Department's limited work force. The City's practice, at least in so far as RAR is concerned, has been to require a $1000

cleanup bond. Each year that amount has been returned to RAR, upon certification that the post-event cleanup was adequate. A $1000 cleanup bond is reasonable in amount, given the potential City employee overtime if the sponsor does not clean up. The return of the full amount to the sponsor who complies with cleanup requirements safeguards the sponsor from any significant financial loss. RAR complains that it has had to wait too long for its refunds. This is an inevitable consequence of dealing with the bureaucracy of a large municipality. There is no evidence that RAR had to wait longer than anyone else.

RAR has not proved indigence in the case at bar. Since 1979, RAR has paid the filing fees and posted the cleanup bonds. It hardly follows that because an unincorporated association of volunteers does not conduct a regular course of business, it

is without fund-raising capacity. Prior to the RAR Central Park event, it has been RAR's practice to "hold one or two or as many as possible - we hold benefits in local clubs, indoor spaces, where we can charge people ..." Thompson, Tr. 97-98. These funds are available for payment of fees, and also have been used by RAR in the past to rent sound equipment. Id. at 98.

I decline to hold the Guidelines facially unconstitutional on this ground. I further find that the processing fee and cleanup bond costs are not unconstitutional as applied to RAR.

The vehicle permits, for which there is no fee, are constitutionally valid. I find from the evidence that, particularly on weekends when the park is closed to vehicular traffic, it is important for the police to identify and control the vehicles using park roads for special events. Vehicle

permits advise the City of details concerning the vehicle and the driver. This is necessary to control entrance and egress and permit the tracing of vehicles in the event of claims or violations.

D. Insurance

The insurance requirement contained in the Guidelines provides, in pertinent part, that "many events are required to have in effect at all times insurance in the amount stated on the Special Event Permit." This requirement is invalid for two reasons. First, it impermissibly vests unfettered discretion in Parks Department administrators responsible for issuing special event permits. Second, the City defendants have not shown that is narrowly tailored to further legitimate state interests.

(i) Impermissible discretion

Excessive delegation of the state's power to limit access to public forums - or

to abridge any other aspect of individual liberty protected by the Fourteenth Amendment - has long been held unconstitutional. Shuttlesworth v. City of Birmingham, 394 U.S. 147 (1969); Cox v. Louisiana, 379 U.S. 559, 569 (1965); Wolin v. Port of New York Authority, 392 F.2d 83, 93 (2d Cir. 1968). Clear and definite standards governing the exercise of delegated authority are necessary to protect the constitutional rights of those subject to the state's regulatory power. Cf. Eisner v. Stamford Board of Education, 440 F.2d 803, 809 (2d Cir. 1971) (Board of Education's policy statement on distribution of written material on school grounds held "neither overbroad nor unconstitutionally vague, so far as it prescribes criteria by which school officials may prevent the distribution ... of written or printed matter.") (emphasis added)

The insurance requirement contained in the Guidelines provides not criteria whatsoever for the exercise of administrative discretion. It simply states that insurance "may" be required, without specifying the circumstances which will lead Parks Department administrators to condition use of the Bandshell on the event sponsor's willingness and ability to obtain a suitable insurance policy.

Furthermore, the insurance section of the Guidelines is ambiguous on the type of insurance that may be required; sponsors are told that the City must be named as additional insured on liability and property damage policies, and that the City must be the sole party insured on "the" fire and extended coverage policy. Whether this language indicates that a fire and extended coverage policy is mandatory while liability and property damage policies are not is

unclear at best. This uncertainly further obfuscates the scope of the delegated authority.

The lack of concrete, ascertainable standards to guide the Parks Department's administration is fatal to this aspect of the Guidelines, which is facially invalid.

(ii) Least restrictive means

Whether permission to use a public forum can be conditioned on obtaining an insurance policy has been recently addressed by the Second Circuit. In Eastern Connecticut Citizens Action Group v. Powers, supra the court held a requirement of $750,000 in liability insurance to be unconstitutional, noting that "[w]hile the state has a legitimate interest in protecting itself from liability for injuries associated with the use of its property," the state bore the burden of proving that the insurance requirement "represen'[ed] the lease

restrictive means of serving that interest." Id. at 1056. Of course, if the insurance requirement does not impinge on the plaintiff's First Amendment rights, the City is not required to justify the policy.

Impingement on plaintiff's First Amendment rights was proven at trial.[6] RAR presented uncontroverted evidence that they were unable to obtain a special event liability insurance policy in May of 1986. Their inability to obtain insurance was linked to two factors; the reluctance of insurance underwriters to write special event policies

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[6] RAR did not make the necessary showing of impingement on its first Amendment rights at the preliminary stage of this action, and thus the defendants were not enjoined from enforcing this regulation against RAR's May 1986 event. The defendants chose not to enforce the insurance requirement, for reasons which are unclear. Perhaps they were merely exercising the broad discretion accorded them by the Guidelines.

for events in Central Park,[7] and the inability of RAR to pay for any sizable insurance policy.[8]

The City argues that since the insurance requirement was not enforced against RAR in 1986, RAR lacks standing to challenge the requirement in this action. See note 6, supra. This argument is without merit. It is uncontroverted that

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[7] Evidence at trial indicated that insurance underwriters were especially reluctant to issue special event liability policies for Central Park events after a "free" concert held in Central Park by Diana Ross precipitated much publicized vandalism and violence in and near the park.

[8] Evidence before the Court at the preliminary stage of this action indicated that when liability insurance was required, the City insisted on a 1 Million/3 Million policy. That means a policy with a limit of $1,000,000 per covered incident, with a $3,000,000 total policy limit. The record contains no information on how much such a policy would cost in today's insurance market, or indeed whether such a policy is even available.

RAR intends to sponsor its May event at the Bandshell every year it is able to do so. That intention alone is sufficient to confer standing on a plaintiff challenging regulations which would deny it access to its chosen public forum, when those regulations provide no indication that they will not apply to the plaintiff. See Los Angeles v. Lyons, 461 U.S. 95, 103 (1983) (standing to seek injunctive relief depends on a showing of actual or threatened injury); See also Schaumburg v. Citizens for Better Environment, 444 U.S. 620, 634 (broad standing conferred on plaintiffs who challenge City enactment on First Amendment overbreadth grounds).

Because impingement on RAR's First Amendment rights by an insurance requirement is demonstrated on this record, the burden falls on the City to show that the requirement represents the least

restrictive means of achieving its legitimate ends. Here, the City has not done so.

The City's evidence on this point is limited to the uncontroversial proposition that events on public property entail some risks - including the risk that the City might be held liable for damage to person or property. See Killian, Tr. 541. In Eastern Connecticut Citizens Action Group, supra, the Court specifically noted that the "state's interest in protecting itself from liability for injuries associated with the use of its property" was legitimate. Id. 723 F.2d at 1056. The City's professed interest in minimizing its exposure to liability claims is no less valid in the present case. Like the Court in Eastern Connecticut, however, I am "not persuaded that the insurance requirement represents the least restrictive means of serving that interest." Id.

In holding that the state did not make an adequate showing to sustain the insurance requirement in the Eastern Connecticut, case, the Court relief on the uncontroverted fact that an "earlier [event sponsored by the same plaintiff] produced no injuries or claims against the state, and indeed that not claims had ever been made resulting from any use of the [public property at issue]". Id. 723 F.2d at 1056. The record before me is equally bare of any evidence of past injuries or past claims against the City arising from any special event at the Bandshell. Furthermore, RAR has now established a seven year track record of sponsoring events which, so far as the evidence reveals, did not produce injuries or otherwise threaten the City with liability claims. On this record I cannot find that the City has met its burden of justifying the

insurance requirement as narrowly tailored to meet its legitimate interests.

This analysis furnishes an additional basis for holding the insurance requirement invalid on its face. Collin v. Smith, 447 F.Supp. 676, 685-86 (N.D.Ill. 1978). Alternatively, the requirement is invalid as applied to RAR.

E. Hours/Dates of use

The Guidelines set separate time limits for "performing arts events," "most" of which "can be permitted" for up to two hours, and for "festivals" and "multiple performance events," which "can be permitted" for up to six hours. The Guidelines do not define the differences between these three types of events, nor was any evidence adduced at trial which explains how, or if, the City categorizes applications by the type of event planned. Every event is allowed two hours pre-show

set up, and two hours postshow break down.[9] "Festivals" are permitted only between the hours of 12:00 p.m. and 6:00 p.m. Evening performances are permitted "under certain circumstances" up to 9:30 p.m.

In addition, the Guidelines prohibit the use of amplified sound at Bandshell events

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[9] The plaintiff does not challenge the limitation on set-up and break down times, although it seemed to be a point of controversy at the preliminary stage of this litigation. Even assuming some First Amendment protection for a speaker's ability to adequately set-up sound amplification and other equipment, I would be unable to find on the present record that two hours was an inadequate amount of time for that purpose. Thus, even if RAR had pressed their challenge to the set-up and break-down limits (and by some of their counsel's questions at trial I gathered they may have meant to), I would find these limits narrowly tailored regulations serving the City's interest in controlling the volume and timing of vehicular traffic in Central Park.

before 12:00 p.m., except "in certain cases of children's theater and acoustic music".[10]

Every limitation on a speaker's ability to reach willing listeners is an impingement on its First Amendment rights. These time provisions constitute a limitation on event sponsors' abilities to reach willing listeners. The burden thus falls on the City to demonstrate that these limitations are narrowly tailored to serve legitimate state interests.

I find that the City has justified the starting and ending time limitations on amplified sound as narrowly tailored regulations serving the legitimate interest in protecting the rights of other park users

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[10] Acoustic music was defined at trial to mean unamplified music. The City offered no explanation why the Guidelines provide a special exception to a regulation concerned with amplified sound.

and nearby residents to the quiet enjoyment of their respective refuges. Permitting amplified sound at the bandshell from 12:00 p.m. until 9:30 p.m. is, if vulnerable to criticism at all, overly generous to event sponsors.

I cannot find, on the record before me, that the City has justified any other aspect of this section of the Guidelines. The City has adduced no evidence that justifies the different treatment accorded to the three types of events mentioned in this section of the Guidelines (performing arts, multiple performance, and festival). To the extent that an event sponsor's First Amendment rights are impinged by being categorized as one type of event instead of another, these vague and undefined categorizations are invalid.

Even if the Guidelines contained some comprehensible criteria for distinguishing

among these events, they are so shot through with unfettered grants of discretion to City Administrators as to invalidate them, with the sole exceptions of the starting and ending times for amplified sound.

F. Attendance

The Guideline section on "attendance" operates as a limit on the size of the audience at any event held at the Bandshell. The Guideline provides that "[i]f the sponsor or the Bandshell Program Director anticipates more than 3,000 [spectators] an alternative site must be considered.... the crowd size [at Bandshell events] must be limited to the above figure."

This limitation on the anticipated size of spectator crowds clearly impinges on the First Amendment rights of RAR, since the First Amendment protects the speaker's right to reach willing listeners. Saia v. New York, 334 U.S. 558, 561 (1948); Kovacs v.

Cooper, supra. The City thus bears the burden of proving that the crowd size limitation contained in the Guidelines is narrowly tailored to further a legitimate state purpose.

The City presented evidence clearly establishing that some limitation on the crowd size of Bandshell events is necessary to further the City's interests in accommodating as many Central Park users as possible. The Bandshell is located in an area of the park which "attracts more visitors than any other," and which is "a major circulation route." At some point, an overflow crowd from a Bandshell event could block the Mall, and thus impede the traffic flow of other park users. Killian, Tr. 549.

The City has failed, however, to establish that the attendance limitation contained in the Guidelines - 3,000 - is narrowly tailored to meet the legitimate

interest in keeping the park accessible to other park users. Indeed, Mr. Killian testified to the contrary. In response to a question from the Court inquiring whether the Guideline section on attendance prohibits a crowd in excess of 3,000 people, Mr. Killian stated:

> "We attempt to do that. However, there have been crowds larger than that size. You know, when you look at the entire concert ground area, you can fit more people...."

Killian, Tr. 551.[11]

---

[11] In the Affidavit of Joseph Killian in opposition to RAR's motion for preliminary injunctive relief, sworn to April 29, 1986 (contained in Joint Trial Exhibit 1), Mr. Killian avers that the San Juan Fiesta event at the Bandshell "draws approximately 40,000 spectators, or twenty times the peak number of 2000 drawn at the RAR concert." Paragraph 30, p. 16. This is the only information I could find in copious record that would indicate that the Bandshell might be able to accommodate more than 5,000 people.

Furthermore, we have seen that the same Guidelines provide for a $100 application processing fee where the anticipated attendance at the Bandshell exceeds 4,000.

On this record, I am unable to find that the City has justified the 3,000 spectator limitation on Bandshell events. There is surely some justifiable limitation available to meet the City's legitimate interest in keeping the area beyond the Bandshell clear for pedestrian traffic, but the record before me reveals only that the City has not yet determined what the justifiable limitation is.

G. Revenue

The Guidelines prohibit, in absolute terms, solicitation "for funds and revenue" anywhere within Central Park.[12] This prohibition clearly impinges on the First Amendment rights of RAR. Schaumburg v. Citizens for Better Energy, supra, 444 U.S. at 633 ("Our cases long have protected speech even though it is in the form of . . . a solicitation to pay or contribute money," quoting New York Times v. Sullivan, 376 U.S.254; ACORN v. City of Frontenac, 714 F.2d 813, 815 (8th Cir. 1983).

The City failed to identify any legitimate interest underlying this prohibition on solicitation. Needless to say, the City

---

12 The Guidelines prohibition on solicitation applies, by its own terms, to all of Central Park even though the Guidelines themselves purport only to regulate use of the Bandshell.

has therefore also failed to meet its burden of demonstrating that this ban on solicitations at Bandshell events is a permissible, narrowly tailored regulation.

H. RAR's Claims for Damages

RAR claims compensatory and punitive damages in respect of the delays and litigation attendant upon the permits ultimately issued for its 1985 and 1986 Bandshell events.

Quite apart from liability, no compensable damages were proved. RAR is an unincorporated association of volunteers, two of whom testified at trial. Assuming arguendo that the City subjected RAR to obstructionism so exaggerated as to rise to a constitutional level, the consequence was that volunteers had to expend additional time and effort in obtaining the permits which in fact issued. No demonstrated loss results from these assumed circumstances. Victims

of constitutional deprivations must prove actual injury and the amount of their damages as in any other civil case, or be content with nominal damages of one dollar. Carey v. Piphus, 435 U.S. 247 (1978). RAR's contention that the volunteer's more time- consuming efforts in obtaining the permits reduced the opportunity to publicize the events, thereby diminishing the attendance, is wholly speculative, and not economically quantifiable.

I also conclude that RAR has failed to prove a deprivation of constitutional rights in respect of either the 1985 or 1986 event. At the April 26, 1985 hearing on the preliminary injunction, Robert Russo, an Assistant Parks Commissioner, testified that he had initially disapproved RAR's 1985 application because, over the prior four years, he and his predecessors had found RAR "very difficult to deal with." The

problems were related to excessive sound, unruly attendees, the presence of unregistered vehicles, and delay in posting a cleanup bond. Joint Ex. 1 at A160-162. Of course, RAR disputes these allegations; and the court-endorsed stipulation of partial settlement clearing the way for the 1985 event left the disputes unresolved. Id. at A121-124. However, to succeed on its claim for damages, compensatory or punitive, RAR was obliged to prove at trial that Russo's articulated reasons were sham, designed to disguise an actual and unconstitutional motivation, such as disapproval of the content of RAR's message. That proof has not been made.

As for the 1986 event, action on RAR's application may have been delayed by the installation of Killian as the Bandshell program director, and his promulgation of the new Guidelines. But there is no

evidence that RAR was discriminated against in the processing of 1986 applications. As noted, the main dispute in 1986 was the City-required use of the sound amplification system. While on the record before me at the time I granted RAR a preliminary injunction on that point, I have for the reasons stated supra declined to make that injunction permanent. In these circumstances, there is no basis for an award of either compensatory or nominal damages.

RAR also claims punitive damages. A claim against a municipality for punitive damages under section 1983 does not lie. City of Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981).

When municipal employees are sued in their individual capacities punitive damages are available against them if their conduct demonstrates "reckless or callous indifference

to the federally protected rights of others." Smith v. Wade, 461 U.S. 30, 56 (1983).

In the present case RAR's claim for punitive damages fails for two reasons. First, the amended complaint charges the individual defendants only in their official capacities. A claim against a public servant "in his official capacity" constitutes in law an effort to impose liability on the entity he represents. Brandon v. Holt, 469 U.S. 464, 471 (1985). But the City is not liable for punitive damages.

Conceptually, RAR could move to amend its pleadings to conform to proof of "reckless or callous indifference" on the part of one or more individual defendants to its constitutional rights. But the question does not arise in the case at bar, since as previously noted there is no such proof to which the pleadings might conform.

All RAR's claims for damages are accordingly denied.

Conclusions

The foregoing constitutes the Court's findings of fact and conclusions of law. Rule 65(a)(2); Rule 52(a), F.R.Civ.P.

To the extent that the parties' proposed findings of fact and conclusions of law are not adopted herein, they are rejected.

An order of permanent injunction and judgment consistent with this Opinion is being entered concurrently.

Dated: New York, New York
April 6, 1987

CHARLES S. HAIGHT, JR.
CHARLES S. HAIGHT, JR.
U.S.D.J.

ORDER OF PERMANENT INJUNCTION AND JUDGMENT

This case having come on for trial before the Court sitting without a jury; and the Court having entered concurrently herewith its Findings of Fact and Conclusions of Law; it is hereby

ORDERED, ADJUDGED AND DECREED as follows:

1. This Court's Order dated May 1, 1986 is vacated and superseded by this Order.

2. The defendants, their officers, agents, servants, employees, and attorneys, and all those persons in active concert or participation with them who receive actual notice of this Order by personal service or otherwise, are hereby PERMANENTLY ENJOINED from enforcing against plaintiff Rock Against Racism the following provisions of those certain "Use Guidelines for the

Naumberg Bandshell in Central Park" promulgated by the City of New York Parks and Recreation Department, under date of March 21, 1986:

(a) The user fee for the Bandshell sound amplification system.

(b) Those provisions of the Guidelines governing hours of use; provided, however, that defendants may enforce those provisions permitting sound amplification only after 12:00 P.M., and requiring events to be finished by 9:30 P.M.

(c) That provision limiting attendance at the Bandshell and its adjacent concert ground to a maximum of 3,000 people at any event.

(d) That provision calling for the furnishing of insurance.

(e) That provision prohibiting the solicitation for funds and revenue.

3. Except as specifically provided in the foregoing paragraph of this Order, plaintiff's motion for a permanent injunction and complaint for declaratory judgment are denied.

4. Plaintiff's claims for compensatory and punitive damages are denied.

The foregoing constitutes the final Order and Judgment of this Court.

MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT, DATED APRIL 30, 1987

ROCK AGAINST RACISM,

Plaintiff,

- against -

BENJAMIN R. WARD, in his official capacity as Police Commissioner of New York;

GEORGE SCARPELLI, in his official capacity as Chief of Operations for Department of Parks;

SHELDON HOROWITZ, in his official [capacity] as Special Events Director for the Department of Parks;

ROBERT RUSSO, in his official capacity as Assistant Parks Commissioner for Citywide Services, New York City Department of Parks and Recreation;

JOSEPH KILLIAN, in his official capacity as Program Director for the Mall Bandshell of the Bethesda Terrace area of Central Park in the City of New York, Department of Parks and Recreation;

MAYOR EDWARD KOCH, in his official capacity as the Mayor of the City of New York; and

THE CITY OF NEW YORK,

Defendants.

HAIGHT, District Judge:

The parties have filed cross-motions pursuant to Rule 59(e) to alter or amend this Court's Order of Permanent Injunction and Judgment dated April 16, 1987.

Defendant's motion is granted. Plaintiff did not include in its proposed conclusions of law a challenge to the anti-solicitation provision contained in the Guidelines. The Court, in accordance with familiar principles, restricted plaintiff's proof at trial to those particular challenges set forth in the proposed conclusions of law. Tr. 271-273. In those circumstances, defendants were not required to offer evidence in support of the

anti-solicitation provision; and the injunction prohibiting enforcement of that provision was improvidently granted. Accordingly the Order of Permanent Injunction and Judgment of April 16, 1987 is hereby amended so as to delete Paragraph 2(e).[1]

I emphasize that I take this corrective action solely on the basis of the issues presented for trial. My deletion of the pertinent provision from the injunction is not intended as a decision on the merits of the dispute.

Plaintiff's motion is denied. It is true that at p. 14 of the Court's Memorandum Opinion dated April 16, 1987, I said in part:

---

[1] Plaintiff asserts, without transcript citations that evidence at trial on the solicitation prohibition was "extensive" despite the restriction noted in the text. This assertion is belied by scrutiny of the trial transcript.

"The City's implementation of the Bandshell Guidelines provides for a sound amplification system capable of meeting RAR's technical needs and leaves control of the sound 'mix' in the hands of RAR." Use of the word "hands" in this particular context was perhaps not entirely clear. I did not intend that the hands of the sponsor's sound engineer actually be upon the knobs and dials of the sound board. Rather, the question is one of artistic control. The injunction is intended to implement that practice described by defendants' witness Killian at trial. He testified at Tr. 501:

> "The private sponsors would basically designate one person to be at the mixing board and to say to the technician at the board what their preference on sound was."

Under the Court's decision, the New York Sound Company technician is required to defer to the sponsor's desires as to sound

quality, but not to the sponsor's demands for increased volume, subject only to those constitutional entitlements described in the prior opinion and which I need not here reiterate.

Plaintiff's Rule 59(e) motion appears to suggest, for the first time and only "upon information and belief," that the New York Sound technician is not able properly to implement a sponsor's instructions as to sound quality or mix. No evidence to that effect was offered at trial; as noted, the evidence is to the contrary.

In short, the understanding of the defendants on this point, summarized at paragraph five of Mr. Kinigstein's affidavit of April 27, 1987, accurately reflects the Court's intention. Accordingly, except in so far as this discussion clarifies the Court's injunction, plaintiff's cross-motion is denied.

The foregoing is SO ORDERED.

Date: New York, New York
April 30, 1987

CHARLES S. HAIGHT, JR.
CHARLES S. HAIGHT, JR.
U.S.D.J.

(3)

88-226

Supreme Court, U.S.
FILED
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No. 88-

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

BENJAMIN R. WARD, et.al.,

Petitioners,

-against-

ROCK AGAINST RACISM,

Respondent.

MEMORANDUM OPPOSING CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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September 6, 1988

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No. 88-

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No. 88-

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

HON. BENJAMIN WARD, in his official capacity as Police Commissioner for the City of New York; GEORGE SCARPELLI, in his official capacity as Chief of Operations for the Department of Parks; and SHELDON HOROWITZ, in his official capacity as Special Events Director for the Department of Parks, Petitioner,	)
v.	)
ROCK AGAINST RACISM, an unincorporated association, Respondent.	)

MEMORANDUM OPPOSING CERTIORARI

Petitioner argues that this Court should grant Certiorari based on three claims: 1) That a conflict of authority exists amongst the Circuit Courts with regard to the standards limiting

regard to the standards limiting regulation of speech, 2) that the Second Circuit applied the wrong standard in allegedly applying the "least restrictive means" test, and 3) that disastrous consequences will be inflicted upon the people of the City of New York if the Appeals Court decision is not reversed.

Respondent submits that each of these claims is false.

There is no disagreement between the circuits that governmental bodies have the power to regulate sound levels, nor is there disagreement that the proper standard to apply to such issues is whether an ordinance regulating speech is narrowly tailored.

> Noise levels may be regulated. Grayned v. City of Rockford, 408 U.S. 104, 116 (1972); Kovacs v. Cooper, 336 U.S. 77, 87-89 (1949); cf. Reeves v. McConn, 631 F.2d 377, 386-87 (5th Cir. 1980) (holding

that City may establish maximum wattage limits for amplified sound, but declaring ordinance unconstitutional where city failed to justify 20-watt limit), reh'g denied, 638 F.2d 762 (1981). That City could lawfully accomplish this purpose by establishing and enforcing reasonable limits on the volume, or noise level, emanating from the bandshell. See, e.g., Jim Crockett Promotion, Inc. v. City of Charlotte, 706 F.2d 486, 493 (4th Cir. 1983) (upholding ordinance limiting decibel levels as measured by standard metering techniques). (Court of Appeals Decision) (S. Ct. 13-14)[1]

The reasonableness of the regulation will be viewed "in light of less drastic means for achieving the same basic purpose". Shelton v. Tucker, 364 U.S. 479, 488; 81 S.Ct. 247, 252; 5 L.Ed.2d 231 (1960). Reeves v. McConn, supra, 631 F.2d at 386. The "narrowly tailored"

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[1]All references in parenthesis are to either Petitioner's Appendix filed with the United States Supreme Court (S. Ct.) or to Appellant's Appendix filed with the Second Circuit (App. Ct.).

standard is specific and designed to be applied to the unique facts of each case, making "further elucidation" unnecessary.

Petitioner claims that the Second Circuit in this case did not apply this standard, but rather a "least restrictive means" test. Thorough reading of the decision shows that the Appeals Court did not strike down this regulation because it imagined some slightly less restrictive means, but rather because trial evidence showed numerous vastly less intrusive alternatives existed to accomplish the legitimate regulation of noise. (App. Ct. 920-925, 936-937). While a regulation that is not the very least intrusive imaginable may well be constitutional, one as outrageously intrusive, as the one in question, is clearly not. It was only in

expanding upon the universally accepted "narrowly tailored" guideline that the Court of Appeals stated:

> However, the method and extent of such a [narrowly tailored] regulation must be reasonable, that is, it must be the least intrusive upon the freedom of expression as is reasonably necessary to achieve a legitimate purpose of the regulation. United States v. O'Brien, 391 U.S. 367, 377 (1968); Legi-Tech Services v. Keiper, 766 F.2d 728, 735 (2d Cir. 1985). See United States vv. Albertini, 472 U.S. 675, 688-89 (1985) ("an incidental burden on speech is not greater than essential, and therefore is permissible under O'Brien, so long as the neutral regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.") (S. Ct. 12)

Respondent submits that the guideline violates first amendment rights, regardless of the test applied, because a host of dramatically less intrusive methods exist to regulate sound levels in Central Park. Forcing demonstrators to

use any sound system and any sound operator chosen by City officials rather than one of their own choosing is surely a most intrusive means of achieving the basic purpose of the proposed regulation, to limit noise. As Judge Dorsey suggests, "(T)he City could impose a reasonable limit on the maximum power of the amplification equipment to be used," (S. Ct. 14) Reeves, 631 F.2d 386-87, rather than forcing the use of, and payment for, a system other than the demonstrator's own. While accurate sound measurement and control in the field was cumbersome a decade or more ago, changing technology has made it easy to accurately monitor noise levels.

> It was a very cumbersome way of controlling the noise levels at the Schaffer concert. But we were able to do it. The techniques are available today, it's much simpler to monitor these levels. (City's

sound expert Schulman.) (App.Ct. 936-937)

As such there is no basis to petitioner's plea that there will be disastrous consequences if the Second Circuit's decision is upheld, namely that they would be forced to "pull the plug", resulting in "substantial risk to public safety and park property." (S. Ct. 24-25) In reality, the "pulling the plug" suggestion was a mere footnote to the substantial list of existing alternatives, highlighting the absurdity of petitioner's idea that there are no viable alternatives to forcing use of the City's sound system and technician. The decision of the Second Circuit implicitly recognizes that the regulation of "noise" produced by political speech may not be stricter, more vague or more intrusive

than the regulation of noise produced by traffic, construction or industry. The City of New York is a self-proclaimed expert in sound technology, successfully and scientifically regulating varied noise level problems such as construction, traffic and ventilation systems. The only noise controlled in a subjective manner is noise protected by the first amendment. This turns the first amendment on its head. To maintain its argument of content-neutrality, then, the City must utilize those same resources in regulating sound levels in Central Park. Because these resources exist, petitioner has no reasonable claim of disastrous consequences resulting form the Second Circuit's decision.

In this case, the disagreement between the District Court and the Appeals Court

was not primarily in the interpretation of the law, but rather over the relative importance of the facts. The Appeals Court decided that the evidence presented showed that City control of the sound system did impinge upon performer's first amendment expression. In discussing this issue, Judge Dorsey writes:

> The district court considered RAR's first amendment interest in using its own sound system and engineer to be attenuated or nonexistent. Rock Against Racism, 658 F. Supp. at 1353. However, RAR and other sponsors clearly have a protected interest in directly controlling the sound mix and the choice of the system as an essential element of the artistic presentation. See Cinevision Corp., 745 F.2d at 568-69 (discussing role of concert promoters as protected by first amendment). (S. Ct. 15)
>
> ....
>
> Thus, the City must demonstrate that its regulation of the volume is reasonably accomplished by the required use of the city's system and the city's operator and that the requirements do not unnecessarily intrude on the right

> of artistic expression. (S. Ct. 16)
>
> ...
>
> The sound system and its operation are not questioned as an element of the artistic performance and thus are protected as a means of artistic expression. (S. Ct. 20)

IN CONCLUSION, the holding of the Court of Appeals is appropriate and consistent with first amendment law. Furthermore, its reversal of the District Court's decision is based primarily on a reevaluation of the significance of certain facts, rather than on substantive disagreement over the application or interpretation of existing law.

THEREFORE, the petition for a writ of certiorari should be denied.

Respondent further requests leave to file a complete response brief to the petition, should the Court wish to see one.

Respectfully submitted,

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Dated: September 6, 1988

Supreme Court, U.S.
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No. 88-226

IN THE

Supreme Court of the United States

October Term, 1988

BENJAMIN R. WARD, in his official capacity as Police Commissioner of the City of New York; GEORGE SCARPELLI, in his official capacity as Chief of Operations for Department of Parks; SHELDON HOROWITZ, in his official [capacity] as Special Events Director for the Department of Parks; ROBERT RUSSO, in his official capacity as Assistant Parks Commissioner for Citywide Services, New York City Department of Parks and Recreation; JOSEPH KILLIAN, in his official capacity as Program Director for the Mall Bandshell of the Bethesda Terrace area of Central Park in the City of New York, Department of Parks and Recreation; MAYOR EDWARD KOCH, in his official capacity as the Mayor of the City of New York; and THE CITY OF NEW YORK,

Petitioners,

-against-

ROCK AGAINST RACISM,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED AUGUST 5, 1988
CERTIORARI GRANTED OCTOBER 3, 1988

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United States Court of Appeals
for the Second Circuit Docket Sheet

Official Caption[1]

Docket No. 87-7417

ROCK AGAINST RACISM,
Plaintiff-Appellant,

v.

BENJAMIN R. WARD, in his official capacity as Police Commissioner of New York; GEORGE SCARPELLI, in his official capacity as Chief of Operations for Department of Parks; SHELDON HOROWITZ, in his official capacity as Special Events Director for the Department of Parks; ROBERT RUSSO, in his official capacity as Assisstant Parks Commissioner for Citywide Services, New York City Department of Parks and Recreation; JOSEPH KILLIAN, in his official capacity as Program Director for the Mall Bandshell of the Bethesda Terrace area of Central Park in the City of New York, Department of Parks and Recreation; MAYOR EDWARD KOCH, in his official capacity as the May of the City of new Yrok; and THE CITY OF NEW YORK.
Defendants-Appellees.

Authorized Abbreviated Caption[2]

Docket No. 87-7417

ROCK AGAINST RACISM v WARD

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[1] Fed. R. App.P. 12(a) and 32(a).

[2] For use on correspondence and motions only.

United States Court of Appeals
for the Second Circuit Docket Sheet

APPELLANT:

JAMES H. FOSBINDER
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APPELLEES:

LARRY A. SONNENSHEIN
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CORPORATION COUNSEL,
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United States Court of Appeals
for the Second Circuit Docket Sheet

DATE	FILINGS – PROCEEDINGS
5-19-87	Copy of district court entries and notice of appeal on behalf of the appellant ROCK AGAINST RACISM filed (fee paid per S.D.N.Y.)
5-21-87	Appellant ROCKA AGAINST RACISM Form C filed (w/pfs)
5-21-87	Appellant ROCK AGAINST RACISM Form D filed
6-3-87	Scheduling order #1 filed
6-16-87	Stipulation re: withdrawal of appeal received.
6-16-87	Order withdrawing appeal without costs and without attorney's fees and without prejudice subject to reinstatement by written notice to the Clerk by Sept 25, 1987 filed.
6-18-87	Certified copy of order withdrawing appeal issued.
9-14-87	Notice of Reinstatement pursuant to the Order of June 18, 1987 filed.
9-16-87	Certified Copy of Notice of Reinstatement issued to the District Court (SDNY).
11-10-87	Record on Appeal filed (Orig. papers of D.C.).
11-17-87	Appellant ROCK AGAINST RACISM brief, received.
11-17-87	Appellant ROCK AGAINST RACISM appendix (2 vols), received (waiting for DC Docket entires, cert. of service, etc.).
11-19-87	1st supplemental recod on appeal filed.
12-2-87	Scheduling order #2 field.
12-3-87	Appellees BENJAMIN WARD, ET AL. brief, received (waiting for appelant's brief ot be filed).

United States Court of Appeals
for the Second Circuit Docket Sheet

DATE	FILINGS – PROCEEDINGS
12-16-87	Appellant ROCK AGAINST RACISM brief, filed. w/pfs.
12-16-87	Appellant ROCK AGAINST RACISM appendix, filed. w/pfs. (2 vols.)
12-16-87	Appellees BENJAMIN WARD, ET AL. brief, filed w/pfs.
12-23-87	Appellant ROCK AGAINST RACISM reply brief, received (waiting for grey covers).
1-5-87	Appellant ROCK AGAINST RACISM reply brief, filed. w/pfs.
2-8-88	Appellant Rock Against Racism motion for extension or alternate date filed
2-10-88	Order denying appellant Rock Against Racism motion for extension or alternate date filed (endorsed on motion filed 2/8/88)
2-25-88	Case submitted before Feinberg, C.H.J., Pratt, C.JJ., Dorsey. D.J.
6-2-88	Judgment affirmed, reversed and remanded by published signed opinion filed, PCD,
6-2-88	Judgment filed
6-10-88	Appellees: BENJAMIN WARD, et al motion for stay of the court's mandate filed (w/pfs)
6-24-88	Order denying appellee WARD motion for stay of mandate, FILED. (WF, CH.J., GCP, C.J., DORSEY, D.J.)
6-24-88	Appellant ROCK AGAINST RACISM motion for enlargement of time filed (w/pfs)
6-27-88	Mandate (judgment and opinion) ISSUED.

United States Court of Appeals
for the Second Circuit Docket Sheet

DATE	FILINGS – PROCEEDINGS
6-28-88	Appellant Rock Against Racism memorandum in opposition to appellee motion for stay *received*
6-29-88	Order denying appellant ROCK AGAINST RACISM motion for extension of time, in light of order filed 6/24/88 denying motion for stay of mandate, FILED.
8-16-88	Notice of filing of petition for writ of certiorari filed (88-226)

United States District Court Docket Sheet

ROCK AGAINST RACISM

Plaintiffs,

v.

WARD, HON. BENJAMIN R., in his official capacity as Police Commissioner for the City of New York

SCARPELLI, GEORGE, in his official capacity as Chief of Operations for the Department of Parks

HOROWITZ, SHELDON, in his official capacity as Special Events Director for the Department of Parks

RUSSO, ROBERT
KILLIAN, JOSEPH
MAYOR ED KOCH
THE CITY OF NEW YORK

Defendants.

Amended Complt
11-5-86

Purs. to 28 U.S.C. 1331, 1332, 1341, 1651 and 2210;
1st & 14th Amndmts. of U.S. Const.

ATTORNEYS

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566-0745

By: Jonathan Pines
Assistant Corporation Counsel
Attorney For
Defendants.

United States District Court Docket Sheet

DATE	NR.	PROCEEDINGS
4-18-85	1	Fld. Complaint; Issd. Summons & Notice purs. to 28 U.S.C. 636(c).
4-18-85	2	Fld. Pltff's Order to Show Cause why a Preliminary Injunction should not issue purs. to rule 65, directing said deft's to permit pltff to conduct a protest & demonstration concert at the 72nd St. Bandshell on 5/5/85, Ret; 4-25-85..Haight.
4-24-85	3	Fld. Pltff's atty Notice of Appearance MBG
5-2-85	4	Fld. Deft's Affdvt of Robert Russo, in opposition to pltff's request for injunctive relief.
5-2-85	5	Fld. Deft's Affdvt of Lieutenant Joseph McNulty, in opposition to pltff's request for injunctive relief.
5-2-85	6	Fld. Deft's memorandum in opposition to pltff's request for injunctive relief.
5-2-85	7	Filed stip & Order of Partial Settlement, the dept. agrees to issue to Rock Against Racism a permit to use the Bandshell area for the purpose stated above on 5-5-85, etc. Pur. to Article II, §3(d) of the Parks Rules & Regulations Rocks Against Racism will be required to post an undertaking in the amt. of $1,000., no later than 5-2-85 etc. as so indicated. So ordered Haight, J.
6-14-85	8	Fld. defts' ANSWER to the cmplt. cc
7-17-85	9	Fld. Order following initial pre-trial conference held on 7-12-85. . . that the action be placed on the Suspense docket of this court with leave to either party to apply on 5 days notice for its restoration, etc. . Haight, J. cmc
9-4-85	10	Filed transcript of record of proceedings 4-26-85

United States District Court Docket Sheet

DATE	NR.	PROCEEDINGS
4-23-86	11	Fld. Pltff's Motion for a Temporary Restraining Order/Preliminary Injunction against the deft from interfering with a scheduled concert.
4-29-86	12	Fld. Defts MEMO OF LAW in opp to pltffs motion for inj relief
4-29-86	13	Filed ORDER defts memo in opp to pltffs motion for TRO & prelim inj serv & filed by hand by 4/29, pltffs reply by 4/30, oral argument on 5/1 . . . Haight, J. cm
5-2-86	14	Filed Defts AFFDVT of J. Killian in opp to pltffs motion for inj relief
5-2-86	15	Filed MEMO OPINION & ORDER# 59257, RAR can use its own sound system, I decline to releive RAR of the liability insurance req. all other charges apply exp sound sysytem; permit will extend to 7pm if RAR so req . . . . Haight, J. cmc
5-19-86	16	Filed defts NOTICE OF APPEAL to USCA 2nd Cir from USDC order of 5/2
6-3-86	17	Filed a true copy of NOTICE OF MOTION from USCA 2nd Cir;; the motion for exp appeal is denied. Record on appeal shall be filed by 6/11; appellants brief & joint appendix by 6/23; appellees brief by 7/14; week of argument as early as 8/11 . . . CLERK, USCA
6-10-86	18	Filed NOTICE that orig record on appeal has been transmitted to USCA 2nd Cir
10-22-86	19	Fld. Order following pre Trial conference. Pre Trial Conference hel on 10-22-86, Pre trial discovery shall be completed by 12-22-86, that all parties must join all amendments to pleadings by

United States District Court Docket Sheet

DATE	NR.	PROCEEDINGS
		11-24-86, that all non discovery motions which do not concern amendment of pleadings of parties must be filed by 1-22-87. . . Haight. J.
10-22-86	20	Fld. Order Following Pre Trial Conference, Ordered that ptlff shall serve & file an amended complt by 11-5-86 . . . . Haight, J.
10-24-86	21	Fld. ORDER that the clerk of the court is directed to restore this case to the courts active docket . . . . So Ordered, Haight, J. cm
11-5-86	22	Fld. AMENDED COMPLT.
11-10-86	23	Fld. ORDER Allowing substitution of Counsel, Ordered that application is granted & that Noah Kinigstein shall enter his appearance in this matter . . . Haight, J.
12-1-86	24	Fld. ANSWER to Amended Complaint by Defendant Benjamin R. Ward, George Scarpelli, Sheldon Horowitz, Robert Russo, Joseph Killian and the City of New York. FA.O.S.
12-2-86	25	Fld. ANSWER to Amended Complaint by defendant Edward Koch. F A.O.S.
3-9-87	26	Fld. Scheduling ORDER for pre trial memo, P. T. memo by 3-20-87 Haight, J. cm
4-26-87	27	Fld. ORDER of permanent injunction and judgment. Ordered that Pltffs motion for a permanent injunction and complt for declartory judgment are denied. Pltffs claims for compensatory and punitive damages are denied. The foregoing constitutes the final order and Judgemnt of this Court . . . Haight, J. cm EOD 4-21-87
4-20-87	28	Fld. MEMO OPINION & ORDER # 60857 for the following reasons that The foregoing consti-

United States District Court Docket Sheet

DATE	NR.	PROCEEDINGS
		tutes the Court's findings of facts and conclusion of law. To the extent that the parties proposed findings of fact and conclusions of law are not adopted herein, they are rejected. An Order of permanent injunction and judgment conistent with this opinion is being entered concurrently . . . . Haight, J. cmc
4-23-87	29	Fld. Defts NOTICE OF MOTION for an order amending the order and judgment of this Court entered 4-16-87, RET: 4-29-87
4-23-87	30	Fld. Defts MEMO OF LAW in support of defts motion to alter and amend Judgment.
4-29-87	31	Fld. Pltffs' Affirmation in Opposition to defts' motion to alter or amend judgment. gp
4-29-87	32	Fld. Pltffs' Notice of Cross-Motion to alter or amend judgment. RET: 4-19-87.
4-29-87	33	Fld. deft's Memo of Law in Opposition to pltff's Cross-Motion to alter or amend.
4-30-87	34	Fld. Memorandum Opinion & Order . . . that the parties have filed cross-motions etc. to alter or amend this Court's Order of Permanent Injunction & Judgment dated 4/16/87. . . Accordingly, except in so far as this discussion (as previously indicated) clarifies the Court's injunction, Plaintiff's cross-motion is denied. So Ordered. HAIGHT, J. SC
5-14-87	35	Fld. NOTICE OF APPEAL from Rock against Racism to the U.S.C.A. for the Second Circuit from the part of the final order of permanent injunction and judgment Sent copies of Notice of Appeal to:

United States District Court Docket Sheet

DATE	NR.	PROCEEDINGS
		PETER ZIMROTH 100 Church Street New York, NY 10007 566-8311 foward copy of appeal to U.S.C.A & District Judge. Original Appeal with 2 copies of Docket sheet to Orders & Appeals.
6-5-87	36	Filed transcript of record of proceedings, dated March 23, 24, 25, 27 30, 31-April 1, 1987
6-24-87	37	Fld TRUE COPY OF ORDER (mandate) from the U.S.C.A for the 2nd Circuit. that the appeal is withdrawn without costs and without Atty's Fees and without prejudice. . . So ordered, Elaine goldsmith, Clerk KY cm
9-21-87	38	Filed LETTER dated 9-11-87 Re: Reinstatement of the Appeal, appreciating as scheduling order so we can proceed with said appeal. by Noah Kinigistein. (TRUE LETTER) copy sent to chambers.
11-19-87	39	Filed NOTICE of 1st SUPPLEMENTAL Record of Appeal transmitted to the USCA for the Second Circuit on 11-19-87.
11-10-87	*40	Filed NOTICE OF ORIGINAL RECORD of Appeal transmitted to the USCA FOR the Second Circuit on 11-14-87.
12-10-87	41	Fld. pltf's AFFDVT. & NOTICE OF MOTION awarding fees and other expenses purs to 42 U.S.C. : 1988, Ret date 12-7-87. KB.
1-14-88	42	Fld. STIP & ORDER that the deft's time to respond to Pltf's motion for attorneys fees be adjourned to 2-9-88. So Ordered Haight, J. cmc KB.

United States District Court Docket Sheet

DATE	NR.	PROCEEDINGS
2-11-88	43	Fld. MEMORANDUM OF LAW in Opposition to Pltf's Motion for Attorney,s Fees. KB.
2-29-88	44	Fld. AFFIDAVIT of Noah A. Kinigstein. KB.
2-29-88	45	Fld MEMORANDUM OF LAW in Opposition to Deft's Memorandum in Opposition to his motion for attorney's fees. KB.
*2-23-88	46	Fld. MEMO ENDORSED on letter. Noah A. Kinigstein dated 2-11-88. Requesting to adjourn the submission date for the motion until 2-26-88. So Ordered Haight, J cmc KB.
6-30-88	47	Fld. MEMORANDUM OPINION & ORDER # 62788. Counsel for defts are directed to settle a modified order of permanent injunction, consistent with the Court of Appeals opinion on five days notice. Pltf is directed to file & serve written submissions in respect of the services of both its attys by 8-31-88. If pltf's application for atty's fees is resisted defts are directed to file opposing papers within thirty days of the date of service of pltf's papers Pltf may file reply papers within 14 days. So Ordered Haight, J. cmc KB.
6-30-88	48	Fld. True Copy of USCA MANDATE. It is Ordered that the order of the District Court is affirmed in part, reversed in part & remanded to the district court for further proceedings in accordance with the opinion of this court. EOD 7-12-88. KB.

United States District Court Docket Sheet

DATE	NR.	PROCEEDINGS
8-31-88	49	Fld. AFFIDAVIT of James Fosbinder in support of pltf's application for award of atty's fees.KB.
8-31-88	50	Fld. AFFIDAVIT of Julie Fosbiner in support of pltf's application for atty's fees. KB.
8-31-88	51	Fld. Pltf's MEMO in Support of Motion for Atty's fees. KB.

Complaint for Preliminary Injunctive Relief,
Entered April 18, 1985

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

ROCK AGAINST RACISM,

Plaintiff,

vs.

HON. BENJAMIN R. WARD, in his official capacity as Police Commissioner for the City of New York

COMPLAINT
85 Civ.

GEORGE SCARPELLI, in his official capacity as Chief of Operations for the Department of Parks

SHELDON HOROWITZ, in his official capacity as Special Events Director for the Department of Parks

Defendants.

Plaintiff, by his undersigned attorney, complaining of defendants, alleges as follows:

I. PARTIES

1. Plaintiff

a. Plaintiff ROCK AGAINST RACISM (Hereinafter RAR) is an unincorporated association organized to protest racism in the United States and around the world.

b. Plaintiff's demonstrations typically consist of political speeches and politically oriented music.

c. Every year since 1979 RAR has presented an event at the 72nd Street Bandshell located in Central Park.

d. This event has been held on the first weekend in May each year.

e. While plaintiffs vigorously promote the event large numbers of people typically show up without direct notification because the same event has been held on the same date at the same site for 6 years.

f. For thousands of New Yorkers the event has become a traditional spring event.

2. Defendants are employees of the City of New York who appear to have decision making powers related to this case.

II. JURISDICTION

3. This action arises under the Constitution and laws of the United States as follows:

a. The First and Fourteenth Amendments to the United States; and

b. 28 U.S.C. 1331, 1332, 1341, 1651 and 2201, and

c. 42 U.S.C. ss 1981, et seq.

III. Statement of Facts

4. On a continuing basis, plaintiff RAR has been organizing its annual event currently scheduled for May 5, 1985.

5. Plaintiff has extensively advertised the time, location and events date.

6. Plaintiff has arranged for speakers from many states and foreign countries.

7. Plaintiff expects 5-15,000 people to attend.

8. The bandshell in question is by far the most suitable site for the event and the use of any other location would cause a tremendous hardship on the organizers and the spectators expected to attend many of whom cannot possibly be notified of any change from the traditional site, time or date.

9. Plaintiffs attorney was told by defendants that the application for this site had been absolutely turned down.

10. Substitutions proposed by defendants are in no way shape or form comparable to the Central Park site.

11. Plaintiff's in the past have entered into good faith negotiatons with regard to details of time, staging etc. and have never conveyed an unwillingness to discuss details related to public safety.

12. Upon Information and belief, the reason for the defendants action is hostility towards the views of plaintiffs and a dislike for the effect their activities have upon the city's image.

IV. CAUSE OF ACTION

13. The aforementioned facts demonstrate an intention on the part of the city to deprive the plaintiffs and thousands of others of fundamental rights, privleges and immunities guaranteed to them by the First and Fourteenth Amendments to the Constitution of the United States.

V. IRREPARABLE INJURY

14. Denial of First Amendment Rights is irreparable injury.

15. Plaintiffs have no other adequate remedy at law.

VI. By reason or in consequence of the actions of defendants, plaintiff has been damaged in an amount not yet determined.

VII. REMEDIES

Wherefore plaintiff requests a judgment as follows.

A. A preliminary and permanent injunction preventing the City of New York from interfering with this annual event from now until the sun burns out or no one shows up, whichever comes first.

B. Compensatory damages in an amount as yet undetermined together with punitive damages and attorneys fees, costs and disbursements incurred in this action; and

C. Such other and further Relief as may be just and proper.

Respectfully submitted,

s/James H. Fosbinder
James H. Fosbinder
Attorney for the Plaintiff

FOSBINDER, SCHACHTER,
WALKER & WINKLER
1053 Williamson Street,
Madison, Wisconsin 53703

Answer by Defendants Ward, Scarpelli and Horowitz, Entered June 14, 1985

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ROCK AGAINST RACISM,

Plaintiff,

- against -

HON. BENJAMIN R. WARD, in his official capacity as Police Commissioner for the City of New York, GEORGE SCARPELLI, in his official capacity as Chief of Operations for the Department of Parks, and SHELDON HOROWITZ, in his official capacity as Special Events Director for the Department of Parks,

Defendants.

ANSWER
85 Civ. 3000 (CSH)

Defendants HONORABLE BENJAMIN R. WARD in his official capacity as Police Commissioner for the City of New York, GEORGE SCARPELLI, in his official capacity as Chief of Operations for the Department of Parks, and SHELDON HOROWITZ, in his official capacity as Special Events Director for the Department of Parks, by their attorney FREDERICK A. O. SCHWARZ, JR., Corporation Counsel of the City of New York, as and for their answer to the complaint respectfully allege as follows:

1. Deny knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph "1" of the complaint, except admit that the plaintiff has applied for a City of New York Parks Department permit to present an event at the 72nd Street Bandshell area located in Central Park on the first weekend in May, for each year since 1979.

Answer by Defendants Ward, Scarpelli and Horowitz

2. Admit the allegations set forth in paragraph "2" of the complaint.

3. Deny each and every allegation set forth in paragraph "3" of the complaint, except admit that jurisdiction is asserted by the plaintiff to be conferred upon this Court by the Constitution of the United States and the statutory sections cited in paragraph "3".

4. Deny knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraphs "4" through "7" of the complaint.

5. Deny each and every allegation set forth in paragraphs "8" through "15" of the complaint.

AS AND FOR A FIRST SEPARATE AND COMPLETE DEFENSE:

6. The complaint fails to state a claim upon which relief may be granted.

AS AND FOR A SECOND SEPARATE AND COMPLETE DEFENSE:

7. The defendants have not violated any rights, privileges or immunities secured to the plaintiff and have acted in accordance with the United States Constitution and federal laws and all other applicable rules, regulations, and procedures.

AS AND FOR A THIRD SEPARATE AND COMPLETE DEFENSE:

8. In the performance of the acts complained of, defendants performed official functions and duties in good faith and in accordance with the provisions of the United States Constitution and all other applicable laws and statutes.

Answer by Defendants Ward, Scarpelli and Horowitz

AS AND FOR A FOURTH SEPARATE AND COMPLETE DEFENSE:

9. Defendants have no official policy, custom, statute, or regulation which permits or promotes the violation of any person's civil rights, nor were the defendants actions or actions based upon any indifference to plaintiff's constitutional rights, or hostility towards the views of the plaintiffs.

Dated: New York, New York
June 14, 1985

FREDERICK A. O. SCHWARZ, JR.
Corporation Counsel of the
City of New York
Attorney for Defendants
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(212) 566-0745

By: s/ Chad A. Vignola
CHAD A. VIGNOLA
Assistant Corporation Counsel

Plaintiff's Motion for A Temporary Restraining Order/Preliminary Injunction, Entered April 23, 1986

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ROCK AGAINST RACISM,
Plaintiff,

v.

HON. BENJAMIN R. WARD, *et al.*,
Defendants.

No. 85 Civ. 3000 (CSH)

MOTION FOR A TEMPORARY RESTRAINING ORDER / PRELIMINARY INJUNCTION

Pursuant to Rule 65 of the Federal Rules of Civil Procedure, plaintiffs move this court to enter a Temporary Restraining Order/Preliminary Injunction against the defendants, forbidding them from interfering with the annual Rock Against Racism concert scheduled for May 4th, 1986.

The basis for this Motion are fully set out in the Complaint, Declarations, Motion for a Temporary Restraining Order, and other material submitted in this case.

s/ James H. Fosbinder
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Fosbinder & Walker
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s/Peter J. Avenia
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(212) 677-1006
(Local Counsel)

Affidavit of Joseph Killian Read in Opposition to Plaintiff's Motion for Injunctive Relief, Entered May 2, 1986

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ROCK AGAINST RACISM,

Plaintiff,

- against -

HON. BENJAMIN R. WARD, in his official capacity as Police Commissioner for the City of New York, et al.,

Defendants.

AFFIDAVIT IN OPPOSITION TO PLAINTIFF'S MOTION FOR INJUNCTIVE RELIEF
85 Civ. 3000 (CSH)

STATE OF NEW YORK }
COUNTY OF NEW YORK } :SS

JOSEPH KILLIAN, being duly sworn, deposes and says:

1. I am Program Director for the Mall/Bandshell/Bethesda Terrace area of Central Park in the City of New York Department of Parks and Recreation ("Program Director"). In this capacity I recently drafted and revised the "USE GUIDELINES FOR THE NAUMBERG BANDSHELL IN CENTRAL PARK" ("Use Guidelines") that are being challenged herein by plaintiff Rock Against Racism ("RAR"). As such, I am fully familiar with the facts and circumstances set forth in this affidavit, which is submitted in opposition to plaintiff's request for injunctive relief.

2. I assumed the position of Program Director on January 27, 1986. Prior to assuming this position I performed around the

country for several years as a clown and mime. I also managed my own company which provided independent consulting services in the area of special events' production. This consulting work consisted primarily of program planning, technical and logistical support analysis, and calendar and tour arrangements. My consulting clients included several municipal recreation departments such as those in Cherry Hill, New Jersey; Nashville, Tennessee; and New Orleans, Louisiana; as well as corporations such as IBM, Harris Corporation, and Sea Pines Plantation in Hilton Head, North Carolina. I also developed a program entitled "City Celebration", for the City of Grand Rapids, Michigan, a similar program to my current mission, though on a smaller scale. This program included dance, rock, jazz, kite flying, and all manner of special events' programming. While I was in Michigan, I worked in production for the Detroit rock music station WABX, which included some experience with audio technology. In addition, my special events' production work has taken me to Korea and Germany on behalf of the United States.

3. My recently assumed Program Director position with the City of New York Department of Parks and Recreation ("Parks' Department"), is my first position ever with the City of New York, in any capacity. Before February 1986, I had vaguely heard of Rock Against Racism, but I did not know what they did, nor had I ever had the opportunity to attend one of its events.

4. As Program Director I am responsible for all facets of the facilities' management of three Central Park areas: the Mall, the Bandshell, and Bethesda Terrace. My job responsibilities encompass the management, promotion, and production of all events in these three Central Park areas. I evaluate permit applications for the areas, planning and scheduling events, as well as actively seek additional programs, events, and performing groups which reflect the diverse ethnic, political, and cultural interests of Park users. As Program Director, I work with the Central Park Assistant Administrator for Design to assure that final restora-

tion and construction plans reflect programmatic and visitor need; I issue permits for performing groups and other group users of the areas, and often attend the events; I work with the Revenue Division and the Assistant Administrator for Visitor Services, reviewing concession requests-for-proposals, and monitor concessionaire practices and performance. In conjunction with the Deputy Administrator of Central Park and the Director of Urban Park Services, I ensure that all programs and events are developed consonant with existing operational support structures, and I function with the Parks' Department Press Office and the Publicity Director for the Central Park Administrator on evaluating and implementing program publicity needs. In addition, and of particular relevance here, I researched, drafted, revised, and implemented the Use Guidelines challenged by RAR.

5. Central Park receives more than 13,000,000 visitors annually. The Bandshell area near 72nd Street and Fifth Avenue within Central Park is the most frequently used park facility in New York City, with the greatest proportion of events attracting large crowds. Approximately 1100 event permits are issued each year for Manhattan parks, with about 330 in Central Park. Of the 330 in Central Park, seventy-five to ninety are granted specifically for the Bandshell, and another eighty to ninety require use of the Bandshell. (For example, this past weekends' March of Dimes Walkathon required registration of the 25,000 participants at the Bandshell area). Thus, approximately half of the Central Park event permits involve use of the Bandshell.

6. I am the first Program Director for the Mall/Bandshell/Bethesda Terrace, the position having just recently been created. At the time of my hiring, I was told that the new position had been created to centralize the fragmented responsibility for the Bandshell, and in recognition of the Bandshell's unique function as the busiest New York City park facility. Previously, many Bandshell applicants complained that they faced a bureaucratic maze of several City agencies and a host of sub-unit departments

and divisions with control over one aspect or another of the application process. Vehicle permits, special event permits, and sound permits each had to be procured from a different office. The Parks' Department's Maintenance and Operations Division, the Special Events Director, Urban Park Services, the Central Park Administrator, and the New York City Police Department all had to be contacted.

7. An adjunct to this fragmented structure was the lack of a single source of rules governing the Bandshell's use. Some rules were uncodified, having been built on years of practice, and different interpretations were possible. Without possession of any set of rules, much less one set of rules specifically applicable to the Bandshell, moreover, applicants had even greater difficulty expeditiously negotiating the bureaucratic obstacles inherent in such dispersed authority.

8. Creation of my position, thus, was intended to address these applicant complaints, and to maximize the public's enjoyable use of the Bandshell. The Bandshell was refurbished recently, and it was hoped that I could provide additional programming to enhance the use of this exceptional facility. Groups seeking use of the Bandshell now need only find one office: mine. The previously diffuse responsibilities have been consigned solely to the Program Director for coordination and implementation. In addition, my initial and primary responsibility when I commenced employment with the City at the beginning of this year, was to develop a uniform set of guidelines to be applied consistently to *all* applicants for the Bandshell area. The regulations were both to inform prospective applicants of the varied potential of the Bandshell, and to specify what was expected of them as users of the Bandshell. The Use Guidelines that plaintiff assails are the culmination of my efforts.

9. A number of steps were taken in the formulation of the Use Guidelines. Having been intimately involved in special events programming and production, including the development

of a similar program in Grand Rapids, Michigan, I knew what general framework would be needed. To develop specific guidelines appropriate for the Bandshell facility, however, it was important for me to familiarize myself with the particular characteristics, requirements, strengths, and disadvantages of the Bandshell, as well as its organizational place in the Parks' Department.

10. I first acquainted myself with the departments having primary responsibility over the Bandshell: the Central Park Administrator, the Parks' Department Manhattan Borough Commissioner, and the Office of the Commissioner. Accordingly, I arranged preliminary interviews with key individuals in each of these offices.

11. In late January and early February 1986 I met with Marie Ruby, the Assistant Administrator for Visitor Services; Elizabeth Barlow Rogers, the Central Park Administrator; Robert Russo, Deputy Commissioner for Operations; Ron Cianciulli, Central Park Chief of Operations, and Sheldon Horowitz, the Special Events Permit Director in the Manhattan Borough Commissioner's Office. I also contacted the former Assistant Director of Special Events, Michelle Shebanie. Although these individuals had broad, general suggestions of areas which should be covered by the regulations, few had any actual experience in the production of events at a facility such as the Bandshell.

12. After these preliminary interviews, I reviewed the follow-up reports by the Maintenance and Operations' crew, of every 1985 event at the Bandshell. This involved review of approximately 100 applications. I also examined about ten to fifteen more detailed reports on events held at the Bandshell, which had generated complaints either by the applicants or by the Department. In addition, I reviewed several studies of general Central Park use, and personally made physical evaluations of the Bandshell and surrounding areas.

13. Based on my knowledge of special events' production, my observations of the specific physical capabilities of the Bandshell area of Central Park, the various descriptive reports of 1985 events and park studies, and based upon my initial discussions with various Parks' Department officials, I crafted the first draft of the Use Guidelines. This first draft was reviewed by my direct supervisor, Marie Ruby, the Assistant Administrator for Visitor Services. Thereafter, I had numerous individual and group discussions with Department officials concerning ideas for revision of the specific language of the guidelines.

14. The proposed regulations thereafter were circulated among, *inter alia*, Lt. Joseph McNulty of the New York City Police Department, Central Park precinct; William Dalton, Chief of Urban Park Services, and Bill Castro, Chief of Recreation. I also contacted Burl Hash, Director of "Celebrate Brooklyn", who is in charge of the Prospect Park Bandshell, and Elizabeth Reese who is familiar with the Prospect Park picnic house. I attended several group meetings including one in February with Manhattan Borough Commissioner Patrick Pomposello, George Scarpelli, Chief of Operations for all Manhattan parks, Marie Ruby, Ron Cianciulli, and Sheldon Horowitz. I met with the Commissioner's staff, and held another meeting attended by Robert Russo, Bill Castro, Kate Pearson, the Manhattan Director of Special Events, and Marie Ruby. Based upon the many comments received, I made revisions of the Use Guidelines.

15. During the course of these discussions, I received many inquiries from applicants seeking information concerning the status of their applications for use of the Bandshell. One inquiry that I received, a letter dated February 24, 1986, was sent by Christy Robb of RAR. A copy of this letter is annexed hereto as Exhibit "1". RAR's application had been submitted by its attorney James Fosbinder, and I contacted the telephone number listed, leaving a message on the answering machine.

16. I also telephoned Ms. Robb at the telephone number listed on her February 24th letter, and I explained to her that I was creating new specific guidelines for the Bandshell. As she partially recounted in her affidavit in support of plaintiff's motion for injunctive relief, I stated that the new guidelines had been drafted but as yet had not been reviewed or approved by Commissioner Stern. I also stated that I hoped to respond to all applicants within two weeks, and that RAR's application for use of the Bandshell on May 4, 1986, would be honored. (Indeed, it has been; subject to the provision of additional information concerning the technical sound system requirements of RAR's concert, the Bandshell is currently reserved for RAR on that date.) Ms. Robb states in her affidavit that I was "extremely vague" about the new regulations. However, given the ongoing nature of drafting and revising the regulations, which were then subject to Commissioner Stern's review and approval, I could not be more specific. At the time, even I could not be certain what the precise substance and detail of the final regulations would be. I was hopeful, moreover, that I shortly would be able to distribute the Use Guidelines in final form.

17. In formulating these guidelines, the decision to provide a sound system for the Bandshell was based on two interrelated reasons. Sound amplification at the Bandshell can conflict with the enjoyment of the park by other park users, as well as disturb residents in nearby, park-adjacent, buildings. The principal introduction to Central Park as designed by Frederick Law Olmsted in the mid 1800's begins at the open-mouthed entrance at Fifth and 59th Streets. Olmsted designed the circulation route to then lead into the Park to the Mall area or promenade. This promenade which funnels Park visitors into the Bandshell area, is lined by one of the oldest stands of elm trees on the east coast. Benches run the length of the promenade beneth the canopy of tree limbs, forming an extraordinary location for peaceful strolling and relaxation. The route then takes one past the Bandshell,

through Bethesda Terrace, and into the purposely wild and chaotic Rambles. Thus, the visitor is gradually carried from urban asphalt to nature thick with trees, rocks, and vegetation.

18. The Parks' Department, therefore, has a significant interest in attempting to preserve the scarce park resources for as many equally deserving city dwellers as possible. The fact that every municipality in the United States regulates sound levels in public areas demonstrates substantial—and constitutional—interest supporting sound regulations. In addition, the Parks' Department determined that many of the complaints concerning unreasonable sound levels at the Bandshell were avoidable, if proper amplification techniques had been used. To appreciate both of these interrelated justifications, of excessive noise and improper amplification, it is important to understand the character of the areas in and near the Bandshell.

19. In my initial research described above, I explored general Central Park usage patterns, reviewing the Central Park User Survey and the vast "Rebuilding Central Park: A Management and Restoration Plan." Another report that I reviewed was an independent study by the Sociology Department of the Graduate Center, City University of New York, titled "New Yorkers and Central Park: A Report to the Central Park Conservancy". A copy of the relevant portion of this report is annexed hereto as Exhibit "2". The study concluded, *inter alia*, that "[t]he large majority of visitors come to Central Park to relax (see Table 6)." Exhibit "2" at 32. The study estimated that passive recreation accounted for over 80% of park use, with simple "relaxation" alone reaching nearly 60% of total park use. Furthermore, only 200 to 300 yards from the Bandshell is the Central Park area known as "Sheep Meadow". Sheep Meadow was designated a quiet zone, along with several other areas throughout the City, by mayoral decree, on July 25, 1985, by Mayor Edward I. Koch. The Dairy, only a few hundred yards further southwest, also fre-

quently has smaller events taking place at the same time that the Bandshell area is in use.

20. For example, on Sunday, May 4, 1986, RAR's requested event date, there will be 25,000 participants in the Cerebral Palsy Bike-a-thon, groups attending an Irish Music performance at Belvedere Castle near 79th Street, a ranger-led artists' outing, and several other events. Throughout the year, at least 160 events are scheduled at the Bandshell: Several groups have suggested that the Parks' Department grant exceptions to the sound level regulations as they are only one-day events. Yet, because amplified events occur on average more than once every other day in the spring and summer, the cumulative daily impact would be to overwhelm unnecessarily and unfairly other constitutionally-protected park users and nearby residents.

21. My investigation of the sound level issue also revealed that sound levels often are higher than necessary simply because the group using the Bandshell did not know how to amplify properly. Proper amplification of sound outdoors is difficult generally and virtually impossible on a "one-time" basis for groups unfamiliar with sound mixing outdoors and the particular bounce patterns and air currents of an area such as the Bandshell. To overcome such complexities and to reach all persons attending an event, groups often merely increased the sound volume. In addition, groups occasionally also have used inadequate equipment for the amplification levels required, and crowds unhappy with the poor sound became disappointed or unruly.

22. To address these twin concerns of excessive sound levels and poor amplification, and to accommodate the interests of park users, nearby residents, and those attending the performance, the Parks' Department decided to contract professional sound technicians—private *outside* vendors—to devise and provide sound system amplification. Several bids were received and currently

are under evaluation by the Department, which anticipates that it may use more than one vendor.

23. During the course of the formulation of the sound system regulation, I spoke to Robert Bennin, Director of Noise Abatement in the New York City Department of Environmental Protection ("DEP"), and Sheldon Wilpon, the Assistant Director. As originally crafted, the Use Guidelines were to set a particular decibel level that could not be exceeded. In my discussions with DEP, however, they indicated to me that the possible variation in actual sound impact of particular decibel readings, might be too great to justify selection of a single decibel level. Differences in air currents, temperature, the time of year, the background ambient sound level, the number of people in the surrounding park area, the nature and location of other events occurring in the park at the same time, the degree of foliage in blossom, and other factors, all apparently could change the perceived "appropriate" level of sound, from event to event. DEP also indicated that budgetary and manpower considerations permitting, they would be measuring and evaluating sound levels in Central Park this summer. Thus, subsequent studies would better inform the decision whether to set a specific permissible decibel level for Bandshell events. Accordingly, I deleted such a numerical standard in the Use Guidelines.

24. During February and early March, 1986, I spoke several times to Sidney M. Nowell, the General Counsel of the Parks Department, who reviewed the Use Guidelines, and made several minor suggestions. Subsequently, the guidelines were submitted to the Commissioner of the Parks Department, Henry Stern, who after a few word changes, approved the Use Guidelines on Friday, March 21, 1986.

25. Given that it was already late March, the following Monday, March 24, 1986, I personally telephoned all applicants seeking use of the Bandshell in April and May, notifying them of the recent issuance of the guidelines. RAR was one such applicant

that I called, and again, I left a message on Mr. Fosbinder's answering machine. Immediately thereafter, I mailed copies of the Use Guidelines to all applicants including RAR.

26. I also telephoned Ms. Robb and described the new regulations to her. When she became upset, I suggested that we set up a meeting with the Chief of Operations, and personnel from Urban Park Services, and Special Events, to attempt to allay any fears or problems that she might have. In fact, I schedule meetings with all groups that have substantial Bandshell events, to work out the details of event execution. Ms. Robb declined my offer of scheduling a meeting, however, stating that I would have to speak to RAR's lawyer. Therefore, I again telephoned Mr. Fosbinder, leaving additional messages. Ms. Robb's affidavit is inaccurate to the extent that she states that she received a "new permit application." Apparently, she refers to receiving the Use Guidelines.[1]

27. Mr. Fosbinder's recounting of our subsequent conversation in his "certification" is inaccurate. The first questions Mr. Fosbinder asked me were whether I had ever read the Constitution; whether I had showed the Use Guidelines to anyone who had read the Constitution, and whether I had showed them to a lawyer. He brusquely refused to attend any meeting to resolve the practical issues of planning the RAR concert/rally. Mr. Fosbinder's statement that RAR received a new "permit application" is untrue. Again, no new "permit application" was sent to RAR. *See* note 1, *supra*. Plaintiff's counsel claims that I stated that the Commissioner had reviewed RAR's permit application. Com-

[1] Along with the Use Guidelines I did request that groups provide me with the technical information concerning what equipment needs they would have. Applicants also had to resubmit some of their original application information for identification purposes; but the only new information was sought the names of the individuals responsible for clean up. Copies of both these blank forms are annexed hereto as Exhibit "3". Because Ms. Robb's affidavit refers to the Parks' Departments' provision of a sound system, I assume that she refers to the Use Guidelines.

misioner Stern does not review permit applications. I told Mr. Fosbinder that Commissioner Stern had reviewed and approved the *Use Guidelines*, which apply to *all* applicants, and that Commissioner Stern happened to be an attorney. I also suggested that any legal questions should be addressed to the Parks' Department General Counsel, Sidney Nowell.

28. Plaintiff therafter moved for a preliminary injunction. In plaintiff's papers seeking a preliminary injunction, they challenge principally four aspects of the regulations: (1) the provision of sound equipment through the Parks' Department; (2) the restrictions on length of the performance and set-up; (3) the required posting of a clean-up bond; and (4) the ban on sponsor-distributed literature.

29. As I previously described, the sound system guideline is a response to the twofold problem of unreasonable sound levels and improper amplification of the Bandshell. RAR's assertion that this guideline, which applies to all groups, is a response to their application, one of hundreds, is solipsistic. Moreover, it is actually a private vendor contracted by the City, and not the Park's Department itself, that will be providing the sound system. This will be a professionally managed system, with state of the art equipment, and two technicians. The Parks' Department is currently evaluating four separate bids by sound companies with extensive outdoor sound experience. The bids were solicited and evaluated by a consultant hired by the Parks' Department, Gary Floyd. Mr. Floyd is a professional sound consultant employed by the State University of New York at Stony Brook. He has been a sound consultant for many theatres, music festivals, and institutions, including staff person for the Smithsonian in Washington, D.C. Copies of the portions of the bids under evaluation, reflecting the types of equipment that they will have available are annexed hereto as Exhibits "4" through "7". The company names have been redacted as no final decision has been reached. Thus, RAR will have ample channels for expression of constitutionally

protected speech. In fact, the professionally managed sound probably will enhance the RAR concert/rally.

30. The guideline concerning curtailment of performance hours was necessitated by several factors. Preliminarily, I note that though plaintiff's motion papers request access time of 6:00 a.m. to 10:00 p.m., their original application requested 4:00 a.m. to 4:00 a.m., or twenty-four hours. A copy of RAR's partially completed application is annexed hereto as Exhibit "8". I also should note that the San Juan Fiesta, which also will be using the Bandshell for a similar program of music and speeches on June 22, 1986, only has park access from 7:00 a.m. to 7:00 p.m.. Their event draws approximately 40,000 spectators, or twenty times the peak number of 2000 drawn at the RAR concert.

31. The general ban of amplified sound before 12:00 noon is in deference to early morning park users and local residents. Studies demonstrate that most early moring park users enter the park in search of quiet enjoyment, relaxation, and nature appreciation. Complaints from nearby residents are augmented tremendously by early hour and late hour amplification of sound. Given the lengthy period of amplification to be granted RAR—six hours in the heart of the day—it is not unreasonable to curtail RAR's amplification of sound further. In addition, RAR will have pre-event access to the park for two hours before noon, and it has two hours for post-event clean up and dismantling, for a total of ten hours of park use.

32. After 6:00 p.m., moreover, new and smaller work crews commence shifts in the park. Clean-up is less efficient in diminishing light and more costly. The Bandshell has no theatrical lighting. Crucially, safety for people entering and exiting the park is much more difficult to assure.

33. Plaintiff conclusorily asserts that defendants' Use Guidelines exhibit a clear cultural bias. *See* RAR's Memorandum of Law at 5. This is a specious claim. A clear priority of my position is to ensure that events scheduled at the Bandshell reflect

the wonderfully variegated cultural, ethnic, spiritual, and political spectrum represented in the City of New York. I have recently scheduled diverse music from a number of rock groups to hispanic music, latin salsa, southern jazz, modern dance groups, ballet, opera, children's theatre, and more. RAR proffers no facts in support of this putative Departmental animus against rock music. RAR's unsupported and unsupportable contrary charge is frivolous and irresponsible.

34. RAR also complains about the imposition of a clean-up bond. Few matters are more vital to the Parks' Department than seeking to maintain the few pristine oases of nature and beauty existing in the City's urban environment. Recently, millions of dollars have been spent attempting to replenish, refurbish, and rejuvenate the beauty of a park which was once one of the world's preeminent. Any time that any large group of individuals seeks to use any portion of the park, including the Bandshell, they are required to post a clean-up bond. RAR is subject to no disparate treatment. This requirement applies to all organized activities involving significant numbers of participants. For example, the March of Dimes Walkathon, a park event yesterday requiring sign-ups at the Bandshell, had to post a $10,000.00 bond last year. Because the money is returned after adequate cleanup, it is difficult to understand RAR's objection to the bond requirement. Indeed, RAR's $1,000.00 in bond money was remitted in full last year.

35. Costs of clean up, moreover, are not insignificant. For example, San Juan Fiesta recently accepted the City's bid—on information and belief, the low bid—for clean-up work after their event. The bid was $6,700.00. Plaintiff argues that because the City does not require "bicyclists, roller skaters, joggers or frisbee players" to insure themselves or to provide a clean-up bond, it is unfair to require the same of RAR. Any event of more than twenty-five participants requires the posting of a clean-up bond. Plaintiff's "roller skaters" argument is patently frivolous and re-

quires no further comment.[2] Having been involved in special events' production for years and in areas all over the country, I can confidently state that a cost of $800.00 to $1,200.00 to produce a program such as RAR's is inexpensive. Certainly, the Parks' Department is not making a profit, and it would be difficult to provide a professional sound system at much less cost. I also should note that there are numerous other excellent and less-used bandshells and other park facilities throughout the City. These also are available for plaintiff's use, and may be even less expensive. At present, plaintiff has neither completed all portions of the original permit, *See* Exhibit "8", nor returned the supplementary request for information on the technical equipment requirements' form. Like any other applicant, plaintiff must complete these forms in order to use the Bandshell.

36. The Use Guidelines which I drafted apply to everyone. RAR is not entitled to special treatment. Nor does it seem necessary to despoil Central Park for all other park users when RAR can reasonably use the Bandshell without infringing on other citizen's rights. Reasonable accommodation can be made for RAR as I indicated from the outset of my discussions with Ms. Robb. As a former performer, as a special events' producer and frequently an avid spectator, I have every intention of ensuring that all groups are handled consistently and that the Bandshell area remains a mecca for all varieties of performers. RAR is but one non-differentiated applicant to the Parks' Department.

[2] In fact, the Police Athletic League which sponsors a "Roller Skate-A-Thon" is required to post a clean-up bond and have liability coverage.

37. Should the Court desire additional information concerning the Use Guidelines, I would be quite willing to testify further. RAR's unfounded accusations and pursuit of meritless claims debase the legitimate interests protected by the first amendment. Although I have been told that Thursday's hearing date is for legal argument alone, I will make myself available on Thursday for the Court's convenience.

s/ Joseph Killian
JOSEPH KILLIAN

Sworn to before me this
29th Day of April 1986.

s/ Norma Kerlin
NOTARY PUBLIC

Exhibit "1" Annexed to the Affidavit of Joseph Killian
Letter, Dated February 24, 1986, From Rock Against
Racism to Joseph Killian

ROCK AGAINST RACISM, NYC

2647 Broadway #2W
New York City, NY 10025

(212) RAR-1197
(212) 316-0426

Feb. 24, 1986

To: Mr. Sheldon Horowitz, Special Events
16 West 61 Street
New York, N.Y. 10023

Mr. Horowitz:

I am writing to you in reference to an application dated May 31, 1985 submitted to your office, in the name of Rock Against Racism by our Attourney Jim Fosbinder. As of this date we have heard nothing from your office as to the status of this permit. As a member of Rock Against Racism I am asking that your office either send the requested permit or a written explanation of why it is delayed or denied. I understand that normally the date applied for is reserved if free and then within two weeks the permit is mailed or an explanationis given for its' denial. Many months have elapsed with no word. Please give this matter your immeadiate attention. Thank you.

Sincerely,

s/ Christy Robb

Christy Robb,
for Rock Against Racism

Exhibit "2" Annexed to the Affidavit of Joseph Killian
Portions of "New Yorkers and Central Park:
A Report to the Central Park Conservancy"

NEW YORKERS and CENTRAL PARK

A REPORT TO THE CENTRAL PARK CONSERVANCY

William Kornblum
Terry Williams

Sociology Department
Graduate Center CUNY

April 1983

Residence of Park Visitors. The majority of frequent visitors live within easy walking distance of the Park. It is difficult to compare 1973 and 1982 data on this variable since the lack of interviews about 96th Street skews the 1973 data, toward the greater proportion of non-Manhattan visitors who enter the Southern Park gates. On the basis of the 1982 survey data, and assuming approximately 3,000,000 different visitors annually, it appears that Central Park receives over 500,000 annual visits by out-of-town residents making it one of the top three tourist attractions in the City (with the Statue of Liberty and the United Nations).

Activities in the Park. The standard dichotomy of "passive versus active" recreation hardly begins to describe the way people use Central Park. When visitors were asked what they did in the Park their answers required more than sixty coding categories. But the distinction between relaxing activities and those requiring strenuous exercise is particularly relevant to issues of Park restoration. Tables 6, 7, and 8 condense the wealth of data on activities in a fashion which retains some of their cultural richness.

The large majority of visitors come to Central Park to relax (see Table 6). The forms this relaxation take are enumerated in Table 7, which shows that perhaps the biggest attraction, next to the park environment itself, is the opportunity one has to watch other people in their activities. But if the majority of park visitors continue a pattern of park relaxation established in the nineteenth century, smaller but highly significant proportions come to play sports, to bike or roller skate, to hear or to play music, or to study the park's natural environment. A small proportion of visitors (although disturbingly large in absolute numbers) admitted to our interviewers that their purpose in the Park that day was connected to some form of social deviance, drug use or drug sales in particular.

That relaxation in all its forms is so important (see Table 6) counters the image of Central Park visitors largely devoted to field sports and strenuous exercise. Visitors to all quadrants of

the Park seem to have the same basic need for relaxation. But it is true that in Park areas which attract a younger constituency, particularly the Upper West Side and Harlem, large minorities of visitors come primarily for sports, biking, and playground use. Even with these differences, however, the basic finding that the majority of park visitors seek opportunities for relaxation and contemplation still holds.

If space demands for active sports were at levels found for more passive, relaxing activities, Central Park would not function nearly as well as it does. There would simply not be enough space to accomodate the demand for sports

TABLE 6

Major Activity Categories, Central Park Visitors, Summer and Fall, 1982 (in percent)

Activity	Weekday	Weekend	Total
Relaxation	54.1	59.7	57.7
Sports	9.5	8.7	9.0
Water	2.7	2.3	2.4
Nature	4.2	3.3	3.7
Wheels	6.9	7.4	7.2
Music	4.8	5.7	5.3
Commute	6.5	2.2	3.8
Zoo	5.6	4.5	4.9
Playgrounds	2.8	3.7	3.4
Drugs/Deviance	2.8	2.4	2.6
Total	100.0	100.0	100.0

Exhibit "2" Annexed to the Affidavit of Joseph Killian

Activity Type	Weekday	Weekend	Total
Active	19.2	19.8	19.6
Passive	80.8	80.2	80.4
Total	100.0	100.0	100.0
N	567	991	1558•

•Some respondents noted more than one activity.

Source: City University of New York sample for Central Park Planners, 1982.

TABLE 7

Types of Relaxation by Central Park Visitors, In Rank Order and by Weekday and Weekend, 1982

Type of Relaxation	Weekday	Weekend	Total	Rank
People Watching	22.1	26.7	25.1	1
Relaxing	21.2	19.1	20.0	2
Thinking	20.2	13.2	15.6	3
Taking in the Park	9.4	11.3	10.7	4
Reading	11.0	10.1	10.1	5
Wandering	5.9	6.1	6.1	6
Sunbathing	1.3	6.0	4.5	7
Waiting	5.0	3.4	3.9	8

Exhibit "2" Annexed to the Affidavit of Joseph Killian

Type of Relaxation	Weekday	Weekend	Total	Rank
Picnic	4.0	3.0	3.3	9
Sleeping	0.8	0.7	0.8	10
Total	100.1	100.8	99.9	

terrains. Indeed it is true that even at existing demand levels the Park can not accomodate all those who request sports facilities for softball and soccer.

Approximately 260,000 annual park visits are accounted for by softball and baseball players (the latter confined primarily to one field in the Western section of the North Meadows area). On a given weekend day during the softball season (April-October, with the heaviest use in May and June) there are approximately 2,000 soft-ball players who completely occupy all designated ball diamonds from Heckscher to the North Meadow. Central Park ball fields are reserved to capacity during the most desirable post-workday and prime weekend hours. Thus the numbers of ball players who use the Park and who thus appear as a proportion of active park users in our exit survey is not an indication of the greater demand for ball fields in the Park. Yet to dedicate more space to ball fields, were that possible, would also increase the excess capacity which exists at times other than those of peak demand. This is the problem with all seasonal activities in the Park whose peak demand exceeds design capacity. One partial solution which shall be discussed later is to attempt to alter the temporal patterns of facility use by encouraging play at off-peak hours.

SOCIAL CHARACTER OF PARK VISITS

There is a rather marked contrast between weekend and weekday Central Park visitors, as shown in Table 9. The weekday visitors tend to be solitary individuals (63.8 percent) while the

weekend visitors are more likely to be members of a family group or couple. These findings highlight the fact that weekends in the Park are more often

* * *

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TABLE 8

Activities by Park Areas,• 1980 (in percent)

Activities	South End	East 72nd	West 72nd	Upper West Side	Upper East Side	Harlem
Relax	56.0	51.0	54.0	44.0	71.0	48.0
Sports	4.0	8.0	6.0	22.0	12.0	9.0
Wheels	5.0	7.0	6.0	7.0	6.0	17.0
Nature	3.0	4.0	7.0	2.0	.5	1.0
Water	3.0	4.0	7.0	2.0	.5	1.0
Commute	5.0	5.0	4.0	1.0	3.0	1.0
Music	6.0	6.0	4.0	2.0	4.0	11.0
Drugs	4.0	1.0	3.0	2.0	2.0	1.0
Zoo	10.0	8.0	3.0	1.0	.5	3.0
Playground	2.0	6.0	2.0	10.0	.5	3.0
Pet	3.0	2.0	6.0	7.0	2.0	4.0
Total••	100.0	100.0	100.0	100.0	100.0	100.0

• Refers to gate areas where respondents were interviewed.

•• Total percentages may be slightly more or less than 100 due to rounding.

TABLE 9

Social Character of Visits to Central Park by Weekday and Weekend Visitors, 1982

Respondent was:	Weekday	Weekend
Alone	63.8	46.7
With Family	9.0	14.2
In a couple	20.0	30.1
With a group of friends	3.2	4.7
Team	0.5	0.5
Tour	0.5	0.2
Other	3.5	3.8
Total•	100.0	100.0

• Total percentages may be slightly more or less than 100 due to rounding.

Table 11 shows the ranking of areas which Park visitors say they tend to avoid, primarily for reasons of perceived safety. These percents represent first choices, in other words 20 percent of respondents said there were certain places or sections of the Park which they do avoid. These were generally located above 96th Street. While the vast

TABLE 10

Central Park Places Visited and Most Favored by All Respondents from Adjacent Neighborhoods

Favorite Places	% Selected Favorite by Manhattanites	Rank
Zoo	15.5	1
Conservatory Water	11.0	2
Reservoir	15.0	3

Exhibit "2" Annexed to the Affidavit of Joseph Killian

Favorite Places	% Visited by Adjacent by Manhattanites	Rank
Sheep Meadow	14.5	4
Boathouse and Lake	12.0	5
Great Lawn	6.0	6
North Meadow	49.0	7
Rink and Dairy	7.5	8
Bethesda Fountain	24.0	9
Heckscher	6.5	10

Places Visited	% Visited by Adjacent Manhattanites	Rank
Zoo	4.0	1
Conservatory Water	8.1	2
W. 72nd Border	2.0	3
W. 80/W. 94	8.3	3
Reservoir	5.5	4
Dairy	11.0	5
E. 66-77	21.0	6
Heckscher Fields	22.0	7
North Ball Fields	64.0	8
Sheep Meadow	9.1	9
Harlem Meer	50.0	10

majority of Park visitors do not volunteer places which they claim to avoid (over 80 percent had no places so indicated), there is a proportion of visitors shown in table 11 who say they avoid the entire Park above 96th Street. We shall see presently that some outspoken Harlem residents regard this fear as part of the "cycle of fear and neglect" which seems to them to account for the more deteriorated condition of places like the 110th Street Boathouse.

Exhibit "2" Annexed to the Affidavit of Joseph Killian

TABLE 11

Places Central Park Visitors Said They Most Avoid, 1982 (in percent)

Park Area	Rank	Percent
Above 96th	1	5
Conservatory Garden	2	3
North Meadow	—	3
Harlem Meer	—	3
The Loch	—	3
Great Hill	3	2
The Ramble	4	1

In summary, the human ecology of Central Park is established by activities which park visitors engage in, as well as by their perceptions of which is appropriate behavior in given Park places. These activites and perceptions are naturally shaped by pre-designed facilities and by official actions, but very often the steps taken by Park administrators are responses to conditions created by the public in specific areas of the Park. The influences are always reciprocal. Over many seasons and generations of park use there emerges a moral order within the Park, a public consciousness about how the Park is faring in terms of its ability to satisfactorily host people with differing recreational goals, with different class and ethnic characteristics, and frequently, with different notions about what is appropriate public behavior. Much is said about increases or decreases in perceived safety in the Park, and about the public's perceptions of the quality of the Park envirionment. Indeed there is a literature now spanning well over

a century which documents the changing tides of public consciuosness about the Park. But throughout the years there has been a remarkable continuity in the ways the Park is used and percieved by the New York public. Despite the changes in these uses and perceptions, some of which have been discussed already, the important story with regard to park use is the striking amount of similarity there is between the Park's use patterns and its human ecology between the nineteenth century and the present.

BEHAVIORAL MAPS OF VISITOR USE

In order to gain an even more variagated picture of the Park's human ecology, let us look at patterns of activities and their temporal phasing on two more or less typical days, one a weekday and the other a Sunday. Both were sunny, relatively warm days—the Sunday was in the early fall and the weeday was in late August. Each was "typical" in that the weather was good and there were no extraordinary events planned that day or evening which would attract unusually large or specialized crowds of visitors. Of course it could be argued that a "typical" day in the Park, if there is one at all, is just that type of day when there is the normal heavy park use and one or more importnat events which draws thousands of additional persons. For the purpose of describing the major comings and goings and "roosting" patterns in the Park, however, it is more convenient to describe the kind of day in which there is not a mass event scheduled. Thus on the weekday and the Sunday we describe, a team of thirty or more trained observers went through every Park area at four distinct time periods: during the morning (8 to 9 A.M.), at midday (11 to 1 P.M.), the afternoon (2 to 4 P.M.), and the evening (5 to 7 P.M.). On each occasion all park users were counted, their precise location in the Park area and their activities were noted, as well as any forms of consumer behavior or conflict.

Information gatherd in these comprehensive "sweeps" of the Park are summerized in graphic form in two summary behavioral maps. These maps show the relative volume of use of the Park's

areas and highlight places in the Park where visitor use tends to be active versus those where use is more passive or restful. The maps are extemely useful summaries of overall park use; they provide the most accurate information now available on the way park users actually situate themselves in specific Park areas. Yet the summary maps require some supplemental narrative description. In particular, it is worthwhile to use the data on which they are based to describe the diurnal rhythms in park use—that is, the daily ebb and flow of Central Park's human visitors.

DIURNAL RHYTHMS IN PARK USE

Let us begin with a warm Sunday. The heaviest use days in any season are Sundays.

Sunday mornings in Central Park begin slowly. Runners, bikers, dog walkers and bird watchers converge on the Park from all directions as the sun comes up. By 8 A.M. on a warm summer Sunday there are already over a thousand active recreationists scattered around the Reservoir, the Great Lawn, the Conservatory pond, and the Sheep Meadow. The areas around the Mall, Bethesda Fountain, and the Ramble are relatively quiet, with a few scattered walkers and early morning newspaper readers here and there on the benches. Later in the day the area from the Plaza gate to the Bethesda Fountain will become the population center of the Park, with people dispersing from this hub of activity throughout the lower reaches of the Park. But in the early morning, these are quiet places.

By 7 A.M. most of the Park's summer inhabitants will have risen and begun their morning ablutions. There are no firm counts of the number of homeless people who live in the Park during the warmer months, but observers counted seven vagrants awakening in the rock formations below the Dairy, from five to fifteen vagrants who had slept in the West 59th Street area above the Heckscher ball fields, and at least twenty more indigent park dwellers or overnight visitors who had strayed into the Park after

a Saturday night binge. In all, there are usually between fifty and one hundred persons who awake in the Park after having slept there the night before. And as the population of homeless and disturbed people increases in Manhattan in general during the warm months, so this population increases in the Park as well.

The early morning is prime time for the Park's birders and nature lovers. Early birders can spot more species in the transition time from dawn to day and they also have the pleasure of peace and quiet, the relative freedom from human distractions and noise. Unlike the joggers, who puff along on the edges of the quiet lawn areas, or the early morning dog walkers whose pets usually demand hurried visits to habitual spots at the Park's edge lawns, the nature students and bird watchers browse throughout the Park and come to know all its habitats. The Ramble is their favorite haunt, but the entire Park offers possibilities for their reverential appreciations. A small proportion of regular park users, the nature lovers are, nonetheless, large in absolute numbers and a vital Park constituency. They help form the eyes and vocal chords for the Park's plant and animal life. They penetrate less well trodden Park areas and regularly report on conditions, which only the most expert Park maintenance personnel monitor.

By mid-morning (10 A.M.), the Sunday rush in to the Park is on. Thankfully for those who seek the relative repose of the park morning, the full rush will not get underway until mid-day or early afternoon. But by mid-morning all the athletic facilities in the Park will be used to capacity and will likely remain so used until much later in the afternoon. The tennis courts and softball fields will be completely occupied by 10 A. M. unless the day is so hot and so late in the summer that the competing charms of Jones Beach, Fire Island, and other more distant recreation areas will have drawn away the largest crowds. But from the days of "Spring Madness" in the first week of warm days and spring bloom, to the onset of summer's "dog days" in late summer, the Park will be used to capacity during most daylight hours.

Our behavioral maps show a good deal of passive recreation use directly adjacent to the most actively used sports facilities (the Great Lawn or the Heckscher and North Meadow Fields). As always in park use, one group's exercise or ritual is another's entertainment. Thus in addition to the normal groups of spouses and children who create spectator picnics around some games, there are groups of elderly men who frequent the bleachers at Heckscher and come to know the various teams well enough to place friendly bets on the outcome of games. This same group of retired, predominantly white park regulars often remains in the area until dusk for a spirited dice game, one of the handful which might be found in one area of the Park or another almost any day of the week.

By early afternoon the Park reaches its period of peak use. Now from 59th Street to 110th Street it is virtually impossible to comprehend the vast array of park activities and impromptu events. Families, couples, and friendship groups stream through the big gates at the Park's Southern corners and elsewhere (especially at the 72nd Street gates and the entrance at Powell Blvd.). The Mall and the internal approaches to the Zoo become a huge "no-ring" circus with clowns, jugglers, mimes, musicians, acrobatic disco skaters, vollyball players, frisbee artists and kibbutzers. Lines form by the vendors' carts. Eager children pull their parents toward the Zoo. The benches along the Mall become crowded but there always seems to be a spot from which to view the activities.

The Sheep Meadow is the Park's center for relaxation, just as the Mall, the Zoo, the Lake and the Drives are its prime strolling ways. At a given moment in the late spring or early summer there will be from 300 to 900 people reposing on the Sheep Meadow. Now that people seeking a quiet place to lie down in the sun themselves no longer fear getting trampled by a soccer or football player, Sheep Meadow has become the undisputed center for horizontal activities in the Southern half of the Park (rivalled only

by the lawns which slope toward the Conservatory Water and Model Boathouse). But no area of the Park is ever entirely peopled by sedentary users. At its most crowded the Sheep Meadow may host a number of frisbee games, a football catch game or two, and assorted kite artists.

Toward 5 P.M. the Park begins to empty rapidly. At dusk the human rhythms are once again dominated by the flow of runners, bikers, and dog walkers. Yet there will be hundreds of strolling couples and solitary walkers in most lawn areas. On especially hot evenings family and neighborhood gatherings above 96th Street may extend far into the night as people seek to escape the heat of their apartments. And in the Park's South end, especially below the Dairy and on the slopes above the Heckscher ball fields, the vagrants and homeless indigent bed down for the night.

Weekday Park rhythms contrast markedly with those of Saturday and Sunday even if there are also some important similarities. Weekday peak hours are at mid-day, when thousands of lunch hour visitors stream into the Park's lower corners and fan out along the Mall, the Lake, and the Zoo. Peak hours on the Park's sports fields are between 4 P.M. and 7 P.M. when adult leagues from Manhattan fill every available space. Pick-up games of soccer and Ultimate Frisbee crowd the outfields and lawns adjacent to the formal ball fields. And before the regular league play begins, the Park's playing fields are heavily used by children from more than thirty private schools which are with in easy walking distance.

Early morning use of the Park peaks earlier on the weekdays than it does on the weekends. Runners must find their exercise time before getting ready for work. And after the prime running and dog walking hours there are (from about 7:30 to 9 A.M.) a few thousand walking commuters who tend to come from Westside neighborhoods and who cross the Park on their way two mid-town offices.

These comparisons between weekday and weekend use can be easily overstated. Park attendance on warm summer weekdays bears real similarities to weekend days. So many New Yorkers and their families will normally be on vacation, or are not in the labor force, or not in school, that weekday park use in late spring and during the summer is quite like weekend use in many respects. The major differences are in times of peak use, as noted, and in the volume of weekday visitors who are solitary visitors (see Table 9). And of course a major difference on many weekdays is the scheduling of evening music and theatre performances which bring thousands of later afternoon visitors into the Park and create untapped possibilities for extending the temporal cycle of park use into the evening and nighttime hours.

Central Park commuters, whose numbers have been swelling with every decline in subway service on Manhattan's Westside, add their eyes and ears to the agents of park social control. But they are not park visitors in the same way that persons whose actual destination is the Park. Yet a close examination of public use patterns in some of the Park's most popular places shows that only a minority of those who are park visitors and who pass through an area actually remain there for any legnth of time.

THE MALL TO BETHESDA FOUNTAIN: FLOWS AND SCENES

More people in Cental Park will be moving toward a Park destination or strolling through the Park than will be settled. Thus at Bethesda Fountain, for example we find that only 20 percent of people who arrive there actually stop for any length of time. Once commuting hours are over, patterns of movement and settling are largely set by flows to and from the Park's major places, or by the flow of people to Park events and activities. This is the general case for most urban parks. It is also true, however, that fads in American popular culture also help shape the way people use or avoid certain areas. The explosion of divergent "lifestyles" in the 1960's has had effects in the Park which remain

today, and especially in the area of the Mall and the Bethesda Fountain.

The Mall has always been a social promenade, a place for people to see who is in the Park and to be seen in return. After strolling the Mall, people generally decide to settle on a nearby green or to continue on a Park ramble. In the 1960's, however, the norms of public conduct underwent such vast changes that places like the Mall and the Fountain became almost transformed socially.

The "baby boom" generation reached its teenage and early adult years in a period of social conflict over American foreign and domestic policy. Racial protest and urban riots made public places in the central cities more frightening to people from the outer rings of metropolitan settlement. Later in the 1960's and throughout the 1970's inflation eroded public budgets; funds to maintain parks decreased and many of the nation's major city parks became increasingly seedy and rundown. Drug use and public drinking became ever more widespread, while efforts to control minor crimes and public nuisance were frustrated by shrinking law enforcement resources and over-crowded courts. Efforts to enliven public places with "happenings" and mass public events of all kinds did help stimulate renewed public use, but they also tended to produce new patterns of turf claims in the parks.

These trends which affected the entire nation had evident and lasting effects on the Mall and Bethesda Fountain. Bethesda in the late 1960's and through the 1970's was a center for inter-racial youth gatherings. The Fountain also became an open drug market and a place to "party" well into the evening. The Mall retained its character as the Park's dominant promenade, but it also took on the rather wild aspect of a permanent rock festival.

This period of loosening public decorum has largely passed. Yet its legacy remains in many forms, some extremely positive and others much less so. There appears from our survey data and

observations throughout the Park to be much more integration by age, ethnicity, and race in the Mall area than there was before the cultural and political movements of the 1960s. Indeed the lower end of Central Park functions much more as the commons for all of Manhattan's communities than it probably ever has. But there is now a greater concentration of street performers and illegal vendors who compete for the visitors' attention and coins. This passage from the field notes of one Park researcher captures the feeling on the Mall during a typical, heavy use day (July 4, 1982):

> Leaving the fountain area I walked past the band shell to the Mall area where a number of comedians, musicians and others competed for the attention of the holiday strollers. One jazz group was composed of alto and tenor saxaphonists, guitarist, bass, drum and conga players. As they began their first tune only one or two strollers stopped to look and listen. By the time the band's soloists were well into the improvisational part of the tune, a crowd of 50 people had formed. Some time later, as the drum and conga played a section leading to the end of the first tune, the crowd numbers had trebled in size.
>
> I counted 170 people listening intently to the up tempo tune. The crowd was truly a mixture of the many New York City sub-cultures. A young white man, casually but expensively clad in a yachting outfit, carried a 5 or 6 year old girl piggy back on his shoulder as he moved his head to the music. A young black woman and a white man were holding hands as they listened. In the back of the crowd two matronly white women near me complained to one another about their inability to see the musicians because of the expanding crowd. A few feet to the right of these women a toothless and disheveled black man (about 40 or 50 years of age) clowned and danced while he tried to sell a handful of scruffy looking "loose joints" (he boasted that they were Herpes repellent).

Suddenly the song came to an end, and just as abruptly much of the crowd had disbursed. Left were 15 people who waited for the next tune. After a period of discussion the musicians began once again, and once again the ranks of the music listeners were swelled by the continuing stream of strollers coming through the area.

The observer might have added to this account a note about the cacaphony caused by loud radios and tape players, as he does in the following notes about the Fountain written on the same July 4th holiday in the Park:

The scene around Bethesda Fountain was at first something of a surprise. For whatever reason, on this holiday much of the overt drug related activity that I had observed there in past summers was less in evidence. I took a seat on the stone barrier just 12 feet east of the great stone stairs, bordering the tree shaded grassy area.

From this vantage point I had a good view of much of the activity around the fountain. Seated next to me were four Hispanic teenaged males who played a large Hitachi radio loudly.

Seating space around the fountain was dominated primarily by younger (i.e. age 17-30) people. They were in groups of as many as 5 and as few as two, with a sprinkling of individual lookers on. Unlike in past visits, there were not the large numbers of those who stand around the fountain and essentially make "happening" mystique of the fountain. On this day the numbers of those seated on the fountain's edge were relatively small. Through the cacaphony of the many radios, the groups seated around the fountain watched the crowds of people parade down into the fountain area.

The size of the crowd walking through the fountain area, though not extremely large, was certainly larger than

the groups that sat around the fountain watching the parade. On this day the throng that strolled through had a heavy representation of white middle class "square" types. Some seemed interested in the social happenings around the fountain. Other strollers were simply walking through the area toward the boat house area of the great stone stair case.

Repeated observation at Bethesda Fountain during the Summer of 1982, combined with systematic counts of foot traffic there, corroborate the more subjective notes of this observer. Bethesda Fountain is much less of a "scene" for drugs and the "youth culture" than it was during most of the 1970s. This change appears to be due for the most part to more effective police enforcement (including the actual closing of the area at times). But it must also be attributed more generally to a gradual public redefinition once again of the Fountain as a place for all to visit and enjoy.

Tables 12, 13, and 14 present numerical data on the movement of people in and out of the Fountain area. They show quite clearly that the West stairs and the paths Northeast and Southeast are by far the most frequently used Bethesda entrances and exits. A significant difference exists between weekdays and weekend days, however. Far more people move into the Fountain through the West stairs (presumably from the Mall) on a Sunday than is true for the weekdays. A matrix of movement through the Fountain (presented here with numbers in absolute form representing a typical weekend day, see Table 12) shows quite dramatically that the flow of people through the fountain goes through the main stairs in the direction of the Metropolitan Museum of Art and the Conservatory Water (or visa versa). And as mentioned earlier, only about 20 percent of all pedestrians who arrive at the Fountain actually choose to linger there on the benches.

Pedestrian counts at the Fountain also provide an interesting natural experiment on the use of the underpass entrance to the

Fountain. So few people use this entrance to the Fountain at any time that we can safely conclude that the closing of auto traffic on weekends is not a factor here. As few people use the underpass when there is auto traffic on Olmstead Way as when the road is closed. The

TABLE 12

Direction of Pedestrian Flow at Bethesda Fountain, Weekday, 1982, (In Absolute Numbers)

		Exit							
		A*	B	C	D	WS	ES	M	T
Entrance	A	11	70	7	7	145	19	6	265
	B	48	5	3	5	43	30	6	140
	C	6	1	1	0	1	2	0	11
	D	7	3	1	3	1	0	0	15
	WS	177	133	11	6	14	9	2	352
	ES	68	40	4	0	2	8	6	123
	M	32	20	0	2	1	2	3	55
	T	347	272	27	23	207	70	23	971

* A = Northeast; B = Southeast; C = Southwest; D = Northwest; WS = West Stair; ES = East Stair; M = Underpass; and T = Total.

underpass appears simply too long and forbidding to be used except by "regulars" and especially by persons involved in the Park's mobile market for soft drugs. Perhaps the best that can be said about this underpass is that it could be closed with no disruption of Park circulation and with a beneficial increase in usable service space. The quality of the Fountain's public comfort stations will likely never reach a desired state of civility without some new efforts at including cafe services there.

The Bandshell. In the vicinity of the Mall and the Fountain the most avoided places are the rear of the Bandshell and the

Rumsey Playground. One need only contrast the well used, modern playground between 5th and the East Green with the desolate emptiness of the nearby Rumsey

TABLE 13

Demographic Characteristics of People Who Came to Bethesda Fountain on Weekdays and Sundays, 1982

	Weekday (N = 790)	Sunday (N = 2050)
Sex		
Male	64.5	55.7
Female	35.4	44.3
Total	99.9	100.0
Ethnicity/Race		
Black	18.1	7.7
White	63.7	74.2
Hispanic	12.4	11.4
Other	5.8	6.7
Total	100.0	100.0
Age		
Child	10.5	7.2
Teen	16.3	11.0
Adult	72.0	81.4
Senior	1.1	0.4
Total	99.9	100.0

facility to know immediately that the latter no longer serves the population for which it was intended. In general, the more successful playgrounds are those located on the periphery of the Park rather than some of the more

Exhibit "2" Annexed to the Affidavit of Joseph Killian

TABLE 14

Pedestrian Flow Through Bethesda Fountain Walks, Both Directions, Weekday and Sunday, 1982

	Weekday (10 AM-6 PM)	Sunday (10 AM-3 PM)
Paths		
Northeast	27.8	13.5
Southeast	22.4	15.6
Southwest	1.0	1.4
Northwest	1.2	3.5
Underpass	2.3	3.5
West Stair	31.5	44.2
East Stair	13.2	18.2
Total	100.0	100.0
N	813	2142

ambitious facilities in the Park's interior. This is certainly true on the East side with reference to the Rumsey Playground. Hidden form view by the Bandshell and the Wysteria Pergola, the lack of playground use at Rumsey and its attraction as a hideout for drug deals strongly suggest that the area be re-designed. There is the possibility here for an urgently needed gain in multi-purpose lawn area which would help relieve some of the pressure on the Great Lawn.

Exhibit "3" Annexed to the Affidavit of Joseph Killian

City of New York Parks & Recreation

Bandshell Use Application Forms

CENTRAL PARK BANDSHELL
TECHNICAL REQUIREMENTS

PLEASE FILL OUT THIS FORM AND RETURN TO:

Joe Killian
Central Park Administrators Office
The Arsenal
830 Fifth Avenue
New York, N.Y. 10021

We must receive this form NO LATER THAN THREE (3) WEEKS PRIOR TO EVENT DATE(S).

For events featuring a number of different acts/bands with differing technical needs a sponsor must file separate technical forms.

ORGANIZATION _____

DATE OF EVENT _____ _____

TIMES:

SET UP FROM _____ to _____.

Actual Event from _____ to _____.

Load Out from _____ to _____.

NAME OF PERFORMING GROUP(S) _____

NUMBER OF PERFORMERS _____

NUMBER OF TECHNICIANS OR PRODUCTION PERSONNEL _____

NAME OF TECHNICAL DIRECTOR: _____

Exhibit "3" Annexed to the Affidavit of Joseph Killian

PHONE NUMBER/DAY ( )_____

PHONE NUMBER/EVENING ( )_____

ADDRESS_____

CITY_____STATE_____ZIP_____

NAME OF STAGE MANAGER:_____

PHONE/DAY_____

PHONE/EVENING_____

ADDRESS_____

CITY_____STATE_____ZIP_____

CITY_____STATE_____ZIP_____

The Central Park Bandshell does not have any lighting instruments or facilities.

The Central Park Bandshell does not have any curtains, wings, borders, scrims, or masking.

The Central Park Bandshell has a small changing area, with a small men's and women's bathrooms. These facilities are small and use must be limited to performers and stage crew.

In addition to the concrete Bandshell stage the DPR has a stage extension. This extension measures 20 x 28 feet.

THERE IS NO PLACE TO STORE OR LOCK VALUABLES IN THE BANDSHELL. PLEASE INFORM ALL PERFORMERS OF THIS. THE DEPARTMENT OF PARKS AND RECREATION AND THE CENTRAL PARK CONSERVANCY ARE NOT RESPONSIBLE FOR STOLEN OR LOST PROPERTY.

Sound Amplification Needs:

_____1/2 Track Tape Recorder

_____Cassette Deck

Exhibit "3" Annexed to the Affidavit of Joseph Killian

_____Stage Monitor Speakers

_____Microphone (describe voice or type of instruments):

_____

_____

_____

_____

_____

_____Microphone Stands

Other Sound Requirements:

_____

_____

_____

_____

_____

Other General Technical Requirements:

_____

_____

_____

_____

_____

If you have any questions, please call the Bandshell Program Director at (212) 988-4460

NAME_____

SIGNATURE_____

DATE_____

Exhibit "3" Annexed to the Affidavit of Joseph Killian

City of New York-Parks & Recreation Permit No. ____

Special Event Permit Application Date_____

SUPPLEMENTARY SPECIAL EVENT PERMIT APPLICATION FOR CENTRAL PARK BANDSHELL

Before filing this application please read the "Special Event Guidelines" (on the back of the Special Event Application) and the "USE GUIDELINES FOR THE NAUMBURG BANDSHELL".

This application must be typed/printed in full.

Providing the proposed event is within the "USE GUIDELINES" and providing the dates requested are available the person listed below will be assigned the permit. Permits are non assignable and non transferable. Permittee must be present for the entire event.

APPLICANT INFORMATION

NAME_____

ADDRESS_____APT#_____

CITY_____STATE___ZIP CODE_____

PHONE/DAY ( )_____

PHONE/NIGHT ( )_____

ORGANIZATIONAL INFORMATION

ORGANIZATION_____

ADDRESS_____

CITY_____STATE___ZIP CODE_____

PHONE ( )_____

_____PROFIT_____NON PROFIT

Exhibit "3" Annexed to the Affidavit of Joseph Killian

If non profit IRS Tax Exempt Number_____

Federal identification Number_____

If organization does not have a Federal I.D. Number list
Applicants Social SecurityNumber_____
Primary purpose of organization_____

_____

TITLE OF EVENT AS IT IS TO BE PUBLIZED:

_____

First Choice of Date_____Rain Date_____

Second Choice of Date_____Rain Date_____

HOURS OF USE:

Set Up From_____To_____

Actual Event From_____To_____

Load Out From_____To_____

TECHNICAL INFORMATION

THE APPLICANT UNDERSTANDS THE DEPARTMENT OF PARKS AND RECREATION IS TO BE THE SOLE AND ONLY PROVIDER OF SOUND AMPLIFICATION. Applicant must fill out the attached Technical Requirements Form.

The Department of Parks and Recreation charges a Users Fee of $100 per performance hour; in addition a fee $100 is required for a one hour sound check. Do not send users fee with this application.

Do not send users fee with this application.

Amount due is to be paid within seven (7) days of permit approval. Following permit approval applicant must pay by

Exhibit "3" Annexed to the Affidavit of Joseph Killian

money order or certified check (cash and personal checks are unacceptable); checks payable to Cultural Council Foundation/Concert Fund.

CLEAN UP

Applicant is responsible for clean up. The three persons listed below must attend the event; provide ample industrial weight garbage bags; present themselves to DPR Bandshell Program Director or representative at the beginning of the event.

1) Name_____
Address_____ Apt. # _____
City_____ State_____ Zip Code_____
Phone_____

2) Name_____
Address_____ Apt. # _____
City_____ State_____ Zip Code_____
Phone_____

3) Name_____
Address_____ Apt. # _____
City_____ State_____ Zip Code_____
Phone_____

Exhibit "3" Annexed to the Affidavit of Joseph Killian

VEHICLES/SEE SPECIAL EVENT APPLICATION

As the applicant I agree to abide by the Department of Parks and Recreation Special Event Guidelines, as listed on the back of the Special Event Application; the Use Guidelines For The Naumburg Bandshell; and applicable Department of Parks and Recreation Rules and Regulations; with special notice to sound amplification, attendance, solicitation of funds, and concessions. I REALIZE THAT FAILURE TO FOLLOW THESE GUIDELINES CAN RESULT IN FORFEITURE OF BOND AND PROVIDE REASON TO DENY FOR MYSELF, THE ORGANIZATION, AND OTHERS INVOLVED ANY ALL FUTURE BANDSHELL PERMIT APPLICATIONS.

Name_____ Signature_____ _____

DATE_____

_____

DPR USE ONLY

1. Administrative Processing Fee AMT._____
   Date Received_____
2. Sound Amplification User Fee AMT._____
   Date Received_____
3. Bond AMT._____
   Date Posted_____
4. Insurance AMT._____
   Date Received_____

_____ _____
Bandshell Program Director Date

Exhibit "4" Annexed to the Affidavit of Joseph Killian

Proposal for Central Park Bandshell Sound Reinforcement System

SOUND ①

16 WEST 22nd ST.
NEW YORK, NEW YORK 10010

PROPOSAL FOR CENTRAL PARK BANDSHELL SOUND REINFORCEMENT SYSTEM

A. Equipment to be provided by Stager Sound Systems, hereafter referred to as "SSS":

1. Microphones: As many as the performance calls for, up to fifteen, or direct input boxes where appropriate as with synthesizers or electric guitars. SSS microphone stock consists of Shure SM 57's and SM 58's, RCA BK5B ribbon mics, and Sony ECM 53 broadcast condenser mics. SSS can also provide any direct boxes that may be necessary.
2. Tape Decks: Teac or Sony Dolby equipped stereo cassette decks are available. Should the performance require reel-to-reel playback SSS can provide a Teac 3340 for that purpose.
3. Mixing Console: Fender 4216 low noise sixteen input stereo mixing board with two independent monitor sends and two effects busses. Spec sheet enclosed.
4. Amplifiers: Modified Hafler P-500's and P-225's for the 'house' system. BGW 750B for the stage monitors.
5. Speakers: Bi-amplified main systems consisting of two 15" Gauss bass bins on each side of the stage

and two Turbosound TMS-1 mid and high frequency speaker boxes on each side of the stage. (Electronic crossover is a Crown VFX-2) Stage monitors are JBL wedges.

This system will be run by Marc Stager. It is sufficient to provide the bandshell area with undistorted stereo sound at loud but not unreasonable levels. There will also be an assistant who can competently set up and run system in an emergency.

Exhibit "5" Annexed To The Affidavit Of Joseph Killian
Portion Of Bids Under Evaluation

SOUND ②

G) we will come to all performances with back-up and spare equipment to insure very little down time if any, from broken equipment.

H) the system and its engineers have the capability to interface any type of electronic instrument, tape deck, video deck, or wireless equipment supplied by the performers.

I) our tape decks are capable of reproducing all the standard formats and speeds supplied by the performers.

J) we will supply the following equipment:

Mixing consoles	1-Walker Audio 2440 24 input channels 4 sub groups 4 auxilary outputs 2 monitor sends 2 effect sends
	1-Teac model 2A,6 inputs 4 outputs
Loudspeakers	4-John Meyer MSL-3 cabinets
	4-Electro voice 18" bass cabinets
	4-Electro voice 15"midrange cabinets
	2-Electro voice HR90 treble horns
	4-Yamaha 2115H two-way monitor cabinets
	2-Altec-Lansing 604 cabinets
Amplifiers	4-Yamaha P2201 power amplifiers
	4-Yamaha P2050 power amplifiers
	1-Yamaha P2100 power amplifiers
	1-Yamaha P2200 power amplifiers
Processing	1-Symetrix 501 compressor and limiter
	1-Aphex stereo aural exciter type B
	2-MXR one-third octave equalizers

Exhibit "5" Annexed to the Affidavit of Joseph Killian

	1-MXR dual fifteen equalizer
	1-Roland SDE 2000 digital delay
	1-Roland 201 space echo
	1-Ashley SC-77 stereo three-way electronic crossover
	2-John Meyer M3 processors
Microphone	8-Shure SM 57 mics (for vocals, drums, and guitars)
	5-Shure SM58 mics (for vocals, percussion and acoustic guitar
	4-AKG 451EB condenser mics (for violins, violas andpercussion)
	1-AKG D12E mic (for bass drum and acoustic bass)
	2-Sennhizer 421 mics (for woodwinds and horns)
	1-Beyer M69N mic (for vocals woodwinds and drums)
	2-ATM 10mics (for drums, percussion and strings)
	1-ATM 40 mic (for vocal and woodwinds)
	1-Nakamichi 200 (for drums and strings)
	5-Minicube direct boxes
Tape recorders	1-Teac 122 dual speed cassette deck
	1-Sony CD5 professional walkman cassette deck
	2-Teac 22-2 half track open reel decks
	1-Teac 22-4 four track open reel deck

Exhibit "5" Annexed to the Affidavit of Joseph Killian

Microphone stands	16 boom type mic stands 8 straight mic stands 4 small mic stands
Cables	all the cables necessary to interface the systems components all equipment is rack mounted

K) the system is capable of either mono or stereo operation

This letter is a formal bid and does constitute a final contract for any services between _____ and the Central Park Administration. If the elements in this bid are excepted, a formal contract will be drawn up by Hear No Evil and signed by both parties.

Thank you For Your Consideration

Clients:

THE PUBLIC THEATRE, NYC
DELACORTE THEATRE, CENTRAL PARK

Exhibit "6" Annexed to the Affidavit of Joseph Killian
Sound Specifications

SOUND SPECIFICATIONS 3

2 MSLI MSL3 Speaker
Lot CL 7 S NC 12 Monitor Speaker
1 MSLI M3 Processor
Lot Crown Amplifiers for NC12 Speakers
2 Crown MT 1000 Ampliers for MSL3 Speakers
1 UREI 1/3 Octave Graphic Equalizer
1 E/V TAPCO 8416 Mixing Deck
1 SONY Cassette Deck for cassette playback
1 TEAC 3440 or Otari 5050B for tape playback
Lot Trucking, Set Up, Engineering

Clients: Radio City Music Hall
Carnegie Hall
Lincoln Center Out-of-Doors Festival
MTV Video Awards
Kool Jazz Festival

Exhibit "7" Annexed to the Affidavit of Joseph Killian
System and Equipment Available

SYSTEMS AND EQUIPMENT AVAILABLE

16 x 2
24 x 6 HOUSE MIX CONSOLES
32 x 10 x 8

BROOKE-SIREN FREQUENCY DIVIDING NETWORKS
KLARK-TEKNIK DN 360 1/3 OCTAVE EQUALISERS
DBX 900 LIMITER /COMPRESSORS
LEXICON PCM-42 DIGITAL DELAY
LEXICON PCM-60 DIGITAL REVERB

CARVER PM 1.5 POWER AMPLIERS

TURBOSOUND TMS-4 FULL*RANGE SPEAKER SYSTEMS

(MONITOR FORMATS)

2—MIX (from house console)

4—MIX
6—MIX YAMAHA MC2408M 24 x 8
MONITOR MIX CONSOLE
8—MIX

:::::WEDGES::::: BI-AMP JBL15" & 1" OR 2" HORN

ALL 1/3 OCTAVE EQUALISERS
CARVER & CROWN POWER AMPLIFIERS

ALL STANDARD MICS: SHURE 57, 58, AKG 451, SENN 421, EURRIO, 20

Exhibit "8"Annexed to the Affidavit of Joseph Killian
Plaintiff's Special Event Permit Application

NYC Department of Parks & Recreation
Special Event Permit Application

Date *1/2/86*
Borough *Man.*

Applicant *JAMES FOSBINDER, Att. FOR RAR* *212 6774899*
Name Telephone No.

2647 Broadway, box 2W NYC, NY 10025
Address

Organization/Sponsor *Rock Against Racism, NYC*
Name Telephone No.

Type of Organization (Social, Political, Commercial) *Cultural-Political*

Names, Addresses, Telephone Numbers of Three Organization Members Besides Applicant:

1. _____
2. _____
3. _____

List any event, with dates previously held in NYC parks by this organization. *The last seven years this*

Date of Event *MAY 4th, 1986* Rain Date *May 11th*

Name of Park *Central Park Bandshell Area*

Type of Event (Rally, Concert, Race, Promotion, etc.) *Rally/Concert*

Number of Participants *5-15,000*

Exact Location In Park *Bandshell Area at 72nd Street*

If Appropriate: Start Location *Washington Square Park 12 noon-1 PM*
Finish Location *Central Park Bandshell area*
Route Through Park *UP 5th avenue &*
through east 72ND street

Exhibit "8" Annexed to the Affidavit of Joseph Killian

List in detail activities planned. (Sale or distribution of food, products, promotional material, celebrities, speeches, ceremonies, etc.)

① *Bathrooms-IN: Bethesda Fountains, Mineral Springs, the park behind the bandshell & the backstage must be open & in working order from 7am till 10pm.*

② *Barricades must be available to us.*

③ *Street lights IN FroNt of baNdshell must be used at dusk.*

④ *Stage and beNches must be available.*

(When appropriate to event, applicant should attach logistical sketch showing physical arrangement, routes.)

Set-up, dismantling, clean-up time: from *4am* to *4am (24hrs.)*

Actual performance time from *12NOON* to *10:00PM*

Will event be advertised? *Yes* How? *IN maNy ways*

When? *all the time*

Will prizes/gifts be distributed or awarded? _____

If so, Type: _____

Will participants or spectators be charged? *NO*

If so, Amount: _____

Check requirements for event and see guidelines on back of form.

VEHICLES *3 heavy trucks for production*
20 cars or vans for band equipment
23 total vehicles

ELECTRICAL Required *X* Not Required _____

ENERGY Type *120 VAC, 25 AMPS*

Music for/at Event *Access before 10AM*

Electrical Amplification *6000 Watts Audio power output*

Exhibit "8" Annexed to the Affidavit of Joseph Killian

As the applicant, I hereby agree to abide by the Rules & Regulations of the Parks Department and by the terms set forth in this application.

_____
Signature of Applicant

ADMINISTRATIVE PROCESSING FEE AMT. *$100.00* DATE RECVD. _____	CONCESSIONS FEE AMT. _____ DATE RECVD. _____
BOND AMT. *1000.00* DATE POSTED _____	INSURANCE AMT. *1-3 MIL* DATE RECVD. _____
APRM/BOROUGH _____ APPROVED _____ DISAPPROVED _____ DATE _____	APRM/RECREATION _____ APPROVED _____ DISAPPROVED _____ DATE _____
BOROUGH COMMISSIONER _____ APPROVED _____ DISAPPROVED _____ DATE _____	ARSENAL DISPOSITION _____ SPECIAL EVENTS _____ CONCESSIONS _____ M&O _____

Memorandum Opinion and Order of Haight, J. Entered May 2, 1986

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ROCK AGAINST RACISM,
Plaintiff.

- against -

85 Civ. 3000 (CSH)

HON. BENJAMIN R. WARD, in his official capacity as Police Commissioner for the City of New York, et al.,
Defendants.

MEMORANDUM OPINION AND ORDER

HAIGHT, District Judge:

The parties are again before the Court within the context of plaintiff Rock Against Racism's ("RAR") annual concert in Central Park. I say "again" because this litigation was generated by last year's concert. This year's concert is scheduled for May 4, 1986, at the Naumburg Bandshell between the Mall and Bethesda Terrace. RAR seeks, on First Amendment grounds, an injunction prohibiting defendants from applying to RAR certain guidelines drafted by the Department of Parks and Recreation for use of that locality.

Commissioner Henry J. Stern promulgated those guidelines under date of March 21, 1986. They were the work product of Joseph Killian, program director for that much-used area of the park. Mindful of various organizations' applications to hold events there, Killian contacted them. One of these was RAR. It is not disputed that Killian telephoned RAR representatives on Monday, March 24, to advise them of the issuance of the use guidelines. RAR acknowledges receiving a copy at "the end of

March, 1986." Brief at 2. RAR filed this application on April 23. To give defendants some time to confront the constitutional issues, I made the motion returnable on May 1, when oral argument was heard.

The timing does not permit extended analysis or discussion. It also has consequences for which RAR is responsible. This application was unduly delayed. Based on past history, RAR could have had no reasonable expectation that defendants would waive these guidelines on RAR's request. In any event, April 9, Killian advised RAR's counsel, James Fosbinder, that the guidelines would be enforced. Mr. Fosbinder thereupon left to conduct a trial in Arizona. No arrangements were made to bring the dispute to the Court before April 23. No evidentiary record exists except the opposing affidavits. In these circumstances, RAR is entitled to relief only to the extent that such entitlement appears as a matter of law from the face of the papers.

(1) *The sound system.*

In prior years, including last year, RAR used its own sound system.

The guidelines provide that the Department "is the sole and only provider of sound amplification"; "user fee of $100 per performance hour, plus a one hour sound check is charged."

This guideline would require RAR to abandon its own system, which it used without complaint by the City last year, and use different equipment whose knobs and dials would be twisted by the hands of strangers—in point of fact, private contractors hired by the City but paid for by RAR. It is recognized that "live musical expression is protected by the first amendment." *Cinevision Corp.* v. *City of Burbank*, 745 F.2d 560, 569 (9th Cir. 1984). I agree with RAR that, absent significant governmental interest requiring a different result, that protection extends not only the words and songs presented but also the sound which actually emanates from the amplification system. That sound may be substantially

affected by the amplification system itself and who controls it. To paraphrase the old song: "The music goes round and round, but it comes out *here.*"

Here there is no significant government interest. RAR acknowledges this year, as it did last year, the constitutional validity of those general park regulations which limit sound. Defendants do not suggest that RAR, using its own equipment, breached those regulations last year. There is no reason to assume it will this year. As a general rule, prospective restraints even of criminal behavior are unconstitutional. *Fernandes* v. *Limmer* , 663 F. 2d 619, 628 (5th Cir. 1981), *rehearing denied*, 669 F. 2d 729, *cert. denied*, 458 U.S. 1124 (1982).

(2) *Financial Aspects.*

RAR complains of the increased cost of obtaining this year's permit.

The cost elements are: a $100 fee to process the application; the $100 per hour sound system use charge; a $1,000 cleanup bond; and the cost (as yet undermined) of obtaining a one-day liability policy in the defendant requires: $1 million/$3 million.

The sound system charge disappears because of my holding under Point (1), *supra.*

The rule in this circuit is that: "Licensing fees used to defray administrative expenses are permissible, but only to the extent necessary for that purpose." *Eastern Connecticut Citizens Action Group* v. *Powers*, 723 F.2d 1050, 1056 (2d Cir. 1983), citing *Fernandes* v. *Limmer, supra.* At least in a case where the plaintiff user pleads and proves its inability to pay such charges, and gives the defendant property owner sufficient notice of that claim to justify the fee, the defendant is required to submit evidence that the administrative fee charged is equal to the cost incurred or to be incurred by defendant for processing plaintiff's request to use the property. *Id.*

In the case at bar, RAR paid the processing fee last year, pursuant to a settlement approved by the Court. Unlike the plaintiff *Eastern Connecticut Citizens Action Group*, the present plaintiff makes no showing of a present inability to afford the licensing fee, or to furnish the $1,000 cleanup bond, again an amount equal to last year's requirement. RAR's motion papers this year list the $100 license fee as an objectionable requirement, but do not say why. If the argument is that a licensing fee is unconstitutional *per se*, *Eastern Connecticut Citizens Action Group* is to the contrary. If RAR's argument is that defendants have not offered sufficient proof of the necessity of that particular amount, the answer is that RAR did not make the present application in sufficient time to put defendants on notice of the necessity of such a showing , or indeed to permit it . It was represented by defendants' counsel at argument that the scale of fees, ranging from $50 through $75 through $100, depends upon the estimated number of attendees at the event. One can plausibly assume that larger events require further administrative expenses. In any event, RAR is not in a position on this on this record to complain of this fee.

For the same reasons, I reach the same conclusion on the "repeat" of last year's $1,000 cleanup bond (all of which, plaintiff's counsel advises, was returned at the end of last year's concert)

The requirement for liability insurance is new from last year. Such a condition for public gatherings and exercise of First Amendment freedoms was considered by the Second circuit in *Eastern Connecticut Citizens Action Group, supra,* and in *Collin* v. *Smith*, 447 F. Supp. 676 (N.D.Ill. 1978), *aff'd*, 578 F.2d 1197 (7th Cir.), *cert. denied*, 439 U.S. 916 (1978). In both *Collin* and *Eastern Connecticut Citizens Action Group*, the plaintiff user pleaded and proved that it either could not afford or could not obtain the insurance as a condition of use. Both courts concluded that the requirement was unconstitutional as applied. The Seventh Circuit concluded that "we do not need to determine now that no insurance requirement could be imposed in any circumstances," re-

garding that as "a close question." 578 F.2d at 1208. In the Second Circuit, however, I regard that question as having been answered in the affirmative. Although defendant lost on the facts of the case, Judge Kaufman recognized for the court that "the state has a legitimate interest in protecting itself from liability for injuries associated with the use of its property," 723 F.2d at 1056, and added: "Nor do we suggest that DOT's fee and insurance requirements would not be valid when reasonably applied." *Id.* at 1057.

In appropriate circumstances, the defendant public authority may be put to its proof that the insurance requirement is valid, and the amount requested reasonable. That is the analysis in *Eastern Connecticut Citizens Action Group, supra,* at 1056-57. But again, in the case at bar, RAR has simply failed to proceed in sufficient time and in appropriate form to fairly pose these issues of fact. I interpret RAR's argument to be that the liability insurance requirement is *per se* unconstitutional. Again, *Eastern Connecticut Citizens Action Group* is to the contrary. RAR offers no proof that, although able to afford insurance it could not obtain it, as in *Collin* v. *Smith, supra,* at 684; or that the insurance, while available, was beyond plaintiff's economic means, as in *Eastern Connecticut Citizens Action Group.* The only argument RAR gave defendants notice of in their motion papers is that since the City does not require individual bicyclists, roller skaters, joggers or frisbee players to insure themselves, it is "unfair" to require the organizers of mass activities to do so. Brief at 6. The argument is frivolous. Defendants did not receive timely and sufficient notice of the arguable constitutional claim, and cannot be criticized for furnishing a more detailed record in opposition to it.

I decline to relieve RAR of the liability insurance requirement.

(3) *Hours of the Event.*

The remaining dispute relates to the hours of the event. It is not entirely clear, from the briefs as amplified by oral argument, what the boundaries of this dispute are, or indeed if there is one.

The remarks of defendants' counsel at argument sounded, at one point, as if defendants were offering the same bloc of time to RAR this year that RAR used last year.

In like vein, RAR's counsel seemed at one point to be requesting the same time as last year. If there is a dispute, it would seem to arise out of the provision in the guidelines that "Festivals may be permitted between 12:00 P.M. and 6:00 P.M." The guidelines go on to provide that: "Evening performances are permitted under certain circumstances. Evening events must be finished by 9:30 P.M." If I understand RAR correctly, it may wish to continue until 7:00 P.M. this year. In view of the fact that the guidelines permit "evening performances" to run until 9:30 P.M., and RAR is asking only for an extension of its First Amendment expression to and including 7:00 P.M., the defendants have failed to demonstrate a constitutionally sufficient basis for cutting RAR off at 6:00 P.M. Accordingly, and assuming RAR meets the other requirements, the permit will extend the permitted usage to 7:00 P.M., if RAR so requests.

In view of the holding that RAR may use its own sound system, the hours for setting the equipment up and taking it down again will be modeled upon the procedures followed without controversy last year.

The foregoing constitutes the Court's findings of fact and conclusions of law. It is SO ORDERED.

Dated: New York, New York
May 1, 1986

s/ Charles S. Haight, Jr.
CHARLES S. HAIGHT, JR.
U. S. D. J.

Amended Complaint, entered on November 5, 1986

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ROCK AGAINST RACISM,

Plaintiff,

- against -

HONOR BENJAMIN R. WARD, in his official capacity as Police Commissioner of New York;

GEORGE SCARPELLI, in his official capacity as Chief of Operations for Department of Parks;

SHELDON HOROWITZ, in his official capacity as Special Events Director for the Department of Parks,

ROBERT RUSSO, in his official capacity as Assistant Parks Commissioner for Citywide Services, New York City Department of Parks and Recreation;

JOSEPH KILLIAN, in his official capacity as Program Director for the Mall/Bandshell of the Bethesda Terrace area of Central Park in the City of New York, Department of Parks and Recreation;

MAYOR EDWARD KOCH, in his official capacity as the Mayor of the City of New York; and

THE CITY OF NEW YORK,

Defendants.

AMENDED
COMPLAINT
85 Civ. 3000
(CSH)

Amended Complaint entered on November 5, 1986

Plaintiff by his undersigned as attorney, complaining of defendants alleges as follows:

PARTIES

1. Plaintiff Rock Against Racism (Hereinafter "RAR") is an unincorporated associate in organized to protest racism in the United States and around the world.

2. Honorable Benjamin Ward is the Commissioner of the New York City Police Department. Defendant Ward is being sued in his official capacity.

3. Defendant George Scarpelli is the Chief of Operations for the Department of Parks, City of New York. Defendant Scarpelli is being sued in his official capacity.

4. Defendant Sheldon Horowitz is the Special Events Director for the Department of Parks, City of New York.

5. Defendant Joseph Killian is the Program Director for the Central Park Bandshell, Department of Parks, and Recreation, City of New York. Mr. Killian is being sued in his official capacity.

6. Defendant Robert Russo is being sued in his official capacity as Assistant Parks Commissioner for City Wide Services, New York City Department of Parks and Recreation.

7. Mayor Edward Koch is being sued in his official capacity as the Mayor of The City of New York.

8. Upon information and belief the City of New York is an incorporated municipality under the laws of the State of New York.

Amended Complaint entered on November 5, 1986

JURISDICTION

9. This action arises under the Constitution and laws of the United States as follows

a. The First and Fourteenth Amendments to the United States Constitution;

b. 29 U.S.C. §§1331, 1332, 1341, 1651 and 2201;

c. 42 USC §§ 1981 et. seq.

d. Federal Declaratory Judgment Act Title 28

United States code §2201 for the purpose of determining a question of actual controversy between the parties as hereinafter appears.

FACTS

10. Rock Against Racism is an unincorpoarted organization that is dedicated to protesting racism in the Untied States. As part of their agenda to protest racism RAR is involved with the medium of electronic music as a way of expressing their political, social, cultural, artistic and ethical views. The use of electronic music is inseperable from the message itself and one cannot be clearly understood without the other.

11. As part of their activities RAR presents a concert/public forum on the issue of racism in the Untied States. This concert/public forum takes place in the Naumburg Bandshell in Central Park in early May. This concern/public forum has been presented for the past 8 years in early May.

12. As part of the early May event many speakers, artists and political thinkers are invited from many states and foreign countries. The event is eagerly anticipated by thousands of New Yorkers and non-New Yorkers. The attendance is between 5-15,000 people.

Amended Complaint entered on November 5, 1986

13. As part of the promo ion of this event the plaintiff actively publicizes the event. At the event itself literature is distributed on the issue of racism in the United States.

14. The Naumburg Bandshell is very centrally located in the lower part of Central Park and is very convenient for all who would like to attend including the handicapped. In addition, the cite of the Naumburg Bandshell has become synonymous with the event itself. Any other site in the City of New York will effectively chill the exercise of plaintiffs free speech.

15. For thousands of New Yorkers the event has become a Traditional spring event.

16. In March 1985, plaintiff applied for a permit to use the Naumburg Bandshell for their spring event. This was their third choice of sites. The plaintiffs originally wanted to hold their event in the Sheep's Meadow or the Great Lawn in Central Park, New York. They were denied both of these sites by the defendants for arbitrary reasons, being forced to apply for their third choice the Naumburg Bandshell.

17. Plaintiff was told that their application had been categorically denied. There was no legitimate reason for said denial.

18. Although substitutions were suggested by the Department of Parks and Recreations, these substitute sites were all located far from mid-town Central Park. These substitute sites were difficult if not almost impossible to get to. The substitute sites by their very nature would have chilled plaintiff's exercise of their right to free speech and association. In sum, the comprable sites were in no way, shape of form comparable to the Naumburg Bandshell.

19. Plaintiff has always demonstated a willingness to enter into good faith negotiations as to the time of the event, the staging etc. and have never conveyed an unwillingness to discuss details related to public safety.

Amended Complaint entered on November 5, 1986

20. Upon information and belief the only reason for defendants actions is hostility toward the views of plaintiffs.

21. In or about April 1985, a prelimiary injunction was brought in this action and as a result a settlement was agreed upon with the Department of Parks to allow plaintiff's event to take place.

22. In May 1985, the annual spring event was held.

23. In or about March 1986, as part of this courts ruling two sets of regulations were promulgated which were to outline a more orderly procedure of the securing of the Naumburg Bandshell, without the previously experienced infraction on plaintiff's free speech rights.

24. On or about March 21, 1986, Defendant Joseph Killian promulgated "Use Guidelines for the Naumburg Bandshell in Central Park" Upon information and belief these guidelines were authorized by all the defendants.

25. The guidelines violate plaintiffs First Amendant Right to free speech and association in that they:

a. Illegally regulate the hours of plaintiffs event at the Bandshell.

b. Illegally prescribe guidelines which regulate the manner and presentation of sound through a sound system.

c. Illegally prescribe and require a permit fee and fee for use of required sound system.

d. Illegally regulate the number of persons who can attend any event.

e. Illegally regulate the distribution of handbills, flyers or posters and illegally regulate the use of flags and banners.

f. Illegally and unclearly regulate the grounds for evaluating whether all terms and conditions of the guidelines have been complied with.

Amended Complaint entered on November 5, 1986

g. Illegally require insurance bonds, and other bonds.

26. In addition, the guidelines are totally arbitrary in that they do not establish or effectuate a neutral policy by which events can be judge as to whether there are violations of the regulations.

COUNT ONE

27. Plaintiff repeats and realleges paragraph one (1) through twenty-six (26) and incorporates these as paragraph twenty-seven (27).

28. The aforementioned facts demonstrate an intention on part of the City to deprive the plaintiff and others of their fundamental rights and privileges guaranteed to them by the First and Fourteenth Amendments to the Constitution of the United States.

SECOND CAUSE OF ACTION

29. Plaintiffs repeats and realleges paragraphs one (1) through twenty-eight (28) and incorporates them as paragraph twenty-nine (29).

30. The action of the plaintiff's First Amendment rights to free speech and association, in that the regulations impermissibly chill and infringe on plaintiff's exercise of their Constitutionally protected rights. As such the plaintiff's invoke the Declartory Judgment Act of the United States Code §2201 for the purpose of determining a question of actual controversy as has been previously outlined herein.

31. As has been shown by the following facts plaintiff has exhausted all administrative remedies available for the protection of their rights.

WHEREFORE, plaintiff prays that

1. The Court enter a judgment for compensatory damages, for count one for an amount yet undetermined with punitive damages and attorney's fees, cost and disbursements in this actions.

Amended Complaint entered on November 5, 1986

2. The Court enter judgment for declartory action striking the New York City Department of Parks and Recreation Regulations which purport to regulate the activities at the Naumburg Bandshell but in fact and reality serve to infringe on plaintiff's first amendment rights to free speech and association; with punitive damages and attorney's fee costs and disbursements of this action.

Dated: New York, New York
October 30, 1986

s/ Noah A. Kinigstein
NOAH A. KINIGSTEIN
370 Seventh Avenue, Suite 1812
New York, NY 10001
(212) 868-2000

JIM FOSSBINDER
8450 Old Spanish Trial
Tuscon, Arizona

Answer to Amended Complaint by Defendants Ward, Scarpelli, Horowitz, Russo, Killian and The City of New York, Entered December 1, 1986

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ROCK AGAINST RACISM,
Plaintiff,

- against -

HON. BENJAMIN R. WARD, in his official capacity as Police Commissioner for the City of New York, et. al.
Defendants,

ANSWER TO AMENDED COMPLAINT
85 Civ. 3000 (CSH)

Defendants, BENJAMIN R. WARD, GEORGE SCARPELLI, SHELDON HOROWITZ, ROBERT RUSSO, JOSEPH KILIAN, AND THE CITY OF NEW YORK by their attorney, FREDERICK A.O. SCHWARZ, JR., Corporation Counsel of the City of New York, as and for their answer to the amended complaint, respectfully allege as follows:

1. Deny knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph "1" of the amended complaint.

2. Admit the allegations set forth in paragraph "2" of the amended complaint.

3. Deny the allegations set forth in paragraph "3" of the amended complaint, except admit that George Scarpelli is Manhattan Borough Chief of Operations in the City of New York Department of Parks and Recreation.

4. Admit the allegations set forth in paragraphs "4", "5", "6", "7", and "8" of the amended complaint.

5. Deny the allegations set forth in paragraph "9" of the amended complaint, except admit that jurisdiction is asserted by plaintiff to be conferred upon this court by the statutory and constitutional sections cited in paragraph "9" of the amended complaint.

6. Deny knowledge or information sufficient to form a belief as to the truth of the allegations set forth in the first sentence of paragraph "10" of the amended complaint, and deny the allegations set forth in the second and third sentences of paragraph "10" of the amended complaint.

7. Deny knowledge or information sufficient to form a belief as to the truth of the allegations set forth in the first sentence of paragraph "11"of the amended complaint, and deny the allegations set forth in the second and third sentences of paragraph "11" of the amended complaint, except admit that plaintiff has held an event at the Naumburg Bandshell in Central Park during the month of May in the years 1979-1986.

8. Deny knowledge or information sufficient to form a belief as to the truth of the allegations set forth in the first two sentences of paragraph "12" of the amended complaint, and deny the allegations set forth in the third sentence of paragraph "12" of the amended complaint.

9. Deny knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph "13" of the amended complaint.

10. Deny the allegations set forth in paragraph "14" of the amended complaint, except admit that the Naumburg Bandshell is located at approximately 72nd Street in Central Park.

11. Deny knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph "15" of the amendment complaint.

12. Deny the allegations set forth in paragraphs "16" of the amended complaint , except admit that plaintiff applied in March

1985 for an event permit to use the Naumburg Bandshell in Central Park.

13. Deny the allegations set forth in paragraphs "17", "18", "19", "20", "21", "22" ,"23", "24", "25", and "26" of the amended complaint.

14. With respect to paragraph "27" of the amended complaint, defendants repeat and reallege their responses as set forth in paragraphs "1" through "13" of this Answer.

15. Deny the allegations set forth in paragraph "28" of the amended complaint.

16. With respect to paragraph "29" of the amended complaint, defendants repeat and reallege their response as set forth in paragraphs "1" through "15" of this Answer.

17. Deny the allegations set forth in paragraphs "30" and "31" of the amended complaint.

AS AND FOR A FIRST SEPARATE AND COMPLETE DEFENSE:

18. The complaint fails to state a claim upon which relief may be granted.

AS AND FOR A SECOND SEPARATE AND COMPLETE DEFENSE:

19. The defendants have not violated any rights, privileges, or immunities secured to the plaintiff and have acted in accordance with the United States Constitution and federal laws and all other applicable rules, regulations, and procedures.

AS AND FOR A THIRD SEPARATE AND COMPLETE DEFENSE:

20. In the performance of the acts complained of, defendants performed official functions and duties in good faith and in

accordance with the provisions of the United State Constitution and all other applicable laws and statutes.

AS AND FOR A FOURTH SEPARATE AND COMPLETE DEFENSE:

21. Defendants have no official policy, custom, statute, or regulation which permits or promotes the violation of any person's civil rights, nor were the defendants' actions or actions based upon any indifference to plaintiff's constitutional rights or hostility towards the views of the plaintiff.

Dated: New York, New York
November 25, 1986

FREDERICK A.O. SCHWARZ, JR.
Corporation Counsel of the
City of New York
Attorney for Defendants
100 Church Street, Rm. 6-C-41
New York, New York 10007
(212) 566-2185

By: s/ Chad A. Vignola
CHAD A. VIGNOLA
Assistant Corporations
Counsel

Answer to Amended Complaint by Defendant Koch, entered December 2, 1986

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ROCK AGAINST RACISM,

Plaintiff,

- against -

HON. BENJAMIN R. WARD in his official capacity as Police Commissioner of New York, et al.

Defendants

ANSWER TO AMENDED COMPLAINT

85 Civ. 3000 (CSH)

. Defendant, EDWARD KOCH, by his attorney, FREDERICK A.O. SCHWARZ, JR., Corporation Counsel of the City of New York, as and for his answer to the amended complaint, respectfully alleges as follows:

1. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph "1" of the amended complaint.

2. Admits the allegations set forth in paragraph "2" of the amended complaint.

3. Denies the allegations set forth in paragraph "3" of the amended complaint, except admits that George Scarpelli is Manhattan Borough Chief of Operations in the City of New York Department of Parks and Recreation.

4. Admits the allegations set forth in paragraphs "4", "5", "6", "7", and "8" of the amended complaint.

5. Denies the allegations set forth in paragraph "9" of the amended complaint, except admits that jurisdiction is asserted by

plaintiff to be conferred upon this court by the statutory and constitutional sections cited in paragraph "9" of the amended complaint.

6. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in the first sentence of paragraph "10" of the amended complaint, and denies the allegations set forth in the second and third sentences of paragraph "10" of the amended complaint.

7. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in the first sentence of paragraph "11" of the amended complaint, and denies the allegations set forth in the second and third sentences of paragraph "11" of the amended complaint, except admits that plaintiff has held an event at the Naumberg Bandshell in Central Park during the month of May in the years 1979-1986.

8. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in the first two sentences of paragraph "12" of the amended complaint, and denies the allegations set forth in the third sentence of paragraph "12" of the amended complaint.

9. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph "13" of the amended complaint.

10. Denies the allegations set forth in paragraph "14" of the amended complaint, except admits that the Naumburg Bandshell is located at approximately 72nd Street in Central Park.

11. Denies knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph "15" of the amended complaint.

12. Denies the allegations set forth in paragraph "16" of the amended complaint, except admits that plaintiff applied in

March 1985 for an event permit to use the Naumberg Bandshell in Central Park.

13. Denies the allegations set forth in paragraph "17", "18", "19", "20", "21", "22", "23", "24", "25", and "26" of the amended complaint.

14. With respect to paragraph "27" of the amended complaint, defendant repeats and realleges its responses as set forth in paragraphs "1" through "13" of this Answer.

15. Denies the allegations set forth in paragraph "28" of the amended complaint.

16. With respect to paragraph "29" of the amended complaint, defendant repeats and realleges its responses as set forth in paragraphs "1" through "15" of this Answer.

17. Denies the allegations set forth in paragraphs "30" and "31" of the amended complaint.

AS AND FOR A FIRST SEPARATE AND COMPLETE DEFENSE:

18. The complaint fails to state a claim upon which relief may be granted.

AS AND FOR A SECOND SEPARATE AND COMPLETE DEFENSE:

19. Defendant has not violated any rights, privileges, or immunities secured to the plaintiff and has acted in accordance with the United States Constitution and federal laws and all other applicable rules, regulations, and procedures.

AS AND FOR A THIRD SEPARATE AND COMPLETE DEFENSE:

20. In the performance of the acts complained of, defendant performed official functions and duties in good faith and in

accordance with the provisions of the United States Constitution and all other applicable laws and statutes.

AS AND FOR A FOURTH SEPARATE AND COMPLETE DEFENSE:

21. Defendant has no official policy, custom, statute, or regulation which permits or promotes the violation of any person's civil rights, nor were the defendant's actions or actions based upon any indifference to plaintiff's constitutional rights or hostility towards the views of the plaintiff.

Dated: New York, New York
November 26, 1986

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CHAD A. VIGNOLA
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Counsel

Transcript of Proceedings On March 23-25, 27, 30, 31 and April 1, 1987 Testimony of Alan Thompson, Witness on Behalf of Plaintiff

Thompson—Direct

(72) ALAN THOMPSON,

called as a witness by the plaintiff, having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. KINIGSTEIN:

Q. Mr. Thompson, where do you live?

A. I live at 2647 Broadway at 100th Street.

Q. Are you familiar with the group Rock Against Racism?

A. Yes, I am.

Q. Could you tell us how you're involved?

A. My involvement is to arrange the sound system and to assist in booking bands.

Q. Are you paid for your work?

A. No, I am not. RAR is an all-volunteer group.

Q. How many years have you been involved with Rock Against Racism?

A. I have been involved since 1981.

Q. Have you been involved in the promotion of the annual spring event in Central Park?

A. Yes.

(73) Q. In what capacity is that?

A. When everything else is finished and I have made sure the sound system is working and the bands are all going to be there, I get out the paste bucket and I go postering and I hand out leaflets in front of concerts and I do whatever I can to encourage my friends to leaflet and so on and so forth.

Q. On the day of the concert itself do you have any role?

A. On the day of the concert itself my role is primarily to set up and engineer the sound system and my secondary role is to make sure the stage manager is operating in full capacity in dealing with all the bands.

Q. Could you describe a little bit what you mean by engineering the sound? What does that really mean?

A. Engineering the sound means setting up all the individual microphones on all the individual instruments, such as, for instance, the drum set would have as many as eight to ten microphones on each drum and cymbal, and what I do is, once all the microphones are set up on the bass and the guitars and the keyboards and so on and so forth, then it's all plugged into a mixing desk, and my job as engineer is during the performance—

Q. Wait a minute. Let's take it a step at a time here. What is a mixing desk?

(74) A. A mixing desk is a console that combines multiple signals into one signal which is then fed into a sound system.

Q. Can you describe for us what that means in real terms?

A. If a band is set up you can either put one microphone on the entire band or you can put individual microphones on the individual instruments and mix them into one signal and feed it into a sound system.

Q. You're at this board, is that correct?

A. Yes, I am at the board, and basically during the performance I am part of the band, because I am balancing all of their instruments together to sound right to their taste.

Q. How do you know what their taste is?

A. They have their manager and/or their own sound mixer present at my elbow.

Q. And what—

A. Or they tell me what they want previously and they give me a list of the songs, saying they want echo or reverb here or there and they want this and that.

Q. What is that, echo and reverb?

A. Effects. Like they will want certain effects at certain times and they will give me a list of songs and at each song they will say what type of sound they want for (75) each song, or they will just station one of their own people with me, which is more common.

THE COURT: At a particular time in a performance can the sound mixer, for example, build up one particular instrument and relatively play down others?

THE WITNESS: Exactly. When the guitarist is about to take a lead, for instance, there will be a slight boost just to improve the dynamics, so you can hear the guitar clearly over the rest, yes. Sometimes it's accomplished by turning the rest down so that it doesn't overpower the audience and sometimes it's accomplished by simply boosting that one signal.

Q. On the soundboard, if you can approximate, how many different individual variations are there for a song?

A. Well, I have somewhere between 200 and 300 separate adjustments that can be made, and during the course of a song my hands will be moving all over the board continually, constantly making adjustments. I can't really tell you—estimate how many adjustments I make, but there are quite a few knobs to turn.

Q. Do these 200 to 300 knobs interrelate with each other as well?

A. Excuse me. I don't understand the question.

Q. Let me give you a hypothetical.

A. Go ahead.

(76) MR. PINES: Object, your Honor. This is not an expert.

THE COURT: Oh, I don't know. He knows more about it than I do. It may assist, Mr. Pines. Let's hear the question and see if it's useful.

Q. Let's say you're raising a certain level on the lead guitar while at the same time doing something to a bass drum or a bass guitar. Those dials interrelate with one another, so that really it's not just an automatic thing but rather you have to know what this dial is in relation to other dials?

A. Right.

Q. And regarding the song?

A. Yes.

MR. PINES: I object to that question as leading.

THE COURT: I have more trouble understanding what it means. If I am supposed to derive something from that last exchange you're going to have to rephrase it.

THE WITNESS: Yes, me too.

MR. KINIGSTEIN: I will rephrase it, your Honor.

Q. Does the manipulation of the dials require any type of artistic understanding?

A. Absolutely. For instance, when you have a concert where there is several different types of music available one has to have a very deep understanding of what (77) a reggae audience or a reggae band would want other than a folk type of band. In other

words, in a reggae type of thing the high hat is supposed to be louder than in any other type of band and the bass guitar is supposed to be very dominant and very boomy and when you go to the next band they want a completely different setup.

Q. How long have you worked the soundboard for the Rock Against Racism concerts in New York at the bandshell?

A. Repeat the question. I thought I just answered that.

Q. How many years have you worked the soundboard?

A. Since 1981. Actually, in 1981 we rented a system. So I guess I was the chief engineer from 1982 on.

Q. How many concerts have you given for Rock Against Racism across the country?

A. I would say, since 1980, somewhere around 200, maybe more.

Q. That's on the soundboard?

A. That's on the soundboard.

Q. Regarding the Rock Against Racism concert in Central Park, are you familiar with environmental concepts that could affect sound?

A. Yes, I am.

Q. Do you take these into consideration as well when you engineer the concert?

(78) A. I do—there are some that have to be disregarded, such as wind. Like the wind can change direction and come and go, increase and decrease, and there really isn't a whole lot you can do about it, except be aware of which direction it's going to generally be flowing. That's just one example.

Q. I call your attention to the concert in 1984, the Rock Against Racism concert. Do you recall that?

A. Yes.

Q. You testified you were on the soundboard that day, is that correct?

A. Yes, I was.

Q. And it was at the bandshell?

A. Yes.

Q. Do you recall if you had any interaction with the Parks Department or the Police Department on that particular day at the concert itself regarding the sound level?

MR. PINES: Your Honor, I would object to this line on the basis that it's cumulative if what the plaintiff is asking is about interference with the soundboard, which has already been testified to by Miss Robb.

THE COURT: I think it's a legitimate line of inquiry, Mr. Pines. This is a witness perhaps in a (79) position to give additional detail. Perhaps I won't hear a third witness on the subject, but I will hear this one.

A. I believe the year that the police put their hands on the board was '83. There has basically been incidents every year except 1986 where Parks Department people and police officers come up and try to engage me in a dialogue and try to talk to me and distract me from doing my job, which is to balance all the instruments together and essentially perform as another performer of the band.

MR. PINES: Your Honor, I object to the response on the grounds that it attempts to state what the police officers were trying to do as opposed to what they did and it is speculation on the police officers' state of mind.

THE COURT: Yes. To that extent I will disregard it. The preferable form would simply be to ask the witness what occurred.

Q. What did occur, if anything, at the concert in 1983?

A. In 1983 there was a band playing and they go by the name Millions of Dead Cops. Their name also means Multi Death Corporation and it also means Missle Destroyed Civilization. Basically they go by the name MDC and it has a variety of different meanings. But they had introduced themselves this particular year as Millions of Dead Cops.

While they were playing, three to four police (80) officers came up behind me. There was no one else from my group with me. I was surrounded by these officers. One of them came up right behind my ear and asked me which knob controls the master volume. I told him and he proceeded to place his hands on the knob and turn it down in a jarring fashion, so that the whole crowd whirled around to find out what went wrong with the sound.

MR. PINES: Objection as to what the whole crowd whirled around for.

THE WITNESS: It's pretty obvious.

THE COURT: Did you observe the crowd do anything?

THE WITNESS: People shouted and complained. They blamed it on me. The cop sort of jumped back and they thought that I was purposely—you know, I was purposely interfering with—

THE COURT: Don't tell me what you think people thought. You observed a crowd reaction?

THE WITNESS: I observed a crowd reaction, which was obviously mixed, a mixed reaction.

THE COURT: All right. Go ahead.

THE WITNESS: I forgot where I was.

THE COURT: Wait for the next question.

Q. Do you recall any other incidents with the police or the Parks Department in the concert of 1983?

(81) A. I think I might just be going over the same ground that Christy already has. They did—you see, we can't be sure who turned off the power, but I think—well, it's just conjecture.

THE COURT: Stop right there. Next question.

Q. Let's go on to the concert in 1984. Do you recall if there were any type of incidents with the Parks Department or the Police Department while you were working the soundboard at the concert?

A. Just basically the same as—the same as it was every year, and the year after that as well, where they just try to talk to me while I am trying to work. We even set up a special person whose job it was to stand next to me and interface with parks people so that I could just do my job.

They would either refuse—they would either just talk to me anyway or—I can't really remember. I remember we had set up a person whose job it was to talk to their person and they would still end up interfering with my job somehow.

Q. How about in 1985? Do you remember any incident at the concert while you were working the soundboard?

A. I remember two police officers ridiculing a Native American folk singer right behind me. As to whether they were trying to affect me, I can't say. But it did (82) affect me.

Q. How about in 1986? Any incidents occur?

A. In 1986 the Parks Department was much less confrontational than they had been in previous years.

Q. I refer your attention to 1984. Did you observe any decibel levels being taken that year?

A. Which Year? I'm sorry.

Q. 1984.

A. 1984? I believe—actually, no. That was in '85. No, I didn't see any equipment or people in 1984.

Q. In 1985 did you observe—

A. I did see people walking around with a decibel meter, but I didn't get close enough to them to have any idea of whether they even had it on or off or what ratings they were obtaining.

Q. Did anybody come over to you and talk to you about the decibel level in 1985?

A. I can't recall exactly. I usually get just a complaint that it's too loud.

Q. Who do you get that complaint from?

A. Numerous people with walkie-talkies. It's never the same person.

Q. Are they members of—

A. The Parks Department. They are either Parks Department officials with a walkie-talkie or they are (83) police, uniformed police.

MR. PINES: Your Honor, could we have a time frame on these questions?

THE COURT: Yes, why don't you sharpen the focus on that.

Q. How about 1985? Were there any complaints by the Parks Department or the New York City Police Department as to the concert, how loud it was?

A. I can't be sure.

Q. How about 1986?

A. There may have been one complaint.

Q. And 1984?

A. I can't be sure of when—of who made which complaint when, in which exact year. I can't be sure enough to really hit it on the head.

Q. Do you ever receive complaints about the levels of sound other than from New York City officials?

A. Yes. I receive numerous complaints from the audience that the sound is not loud enough or that the bass is not—people always have a comment to make whether the bass is too loud or too soft. But the biggest complaint that we get, which I usually get right after I accommodate the Parks Department person by turning it down—okay. What happens is the Parks Department person complains. I turn it down to accommodate them and then 10, 15 people (84) from the audience come up to me one by one over the next half an hour and tell me that I'm ruining the band's set and that it's not loud enough and that they are very disappointed.

THE COURT: And do you do anything in response to that?

THE WITNESS: Basically, I really try to put myself in the position where I don't have the Parks Department coming up to me every half an hour and talking to me and bothering me. So I generally just try to explain to people that the Parks Department has instructed me to turn it down and we don't want them to cut off our power.

Generally they used to threaten that they would cut the power immediately if we didn't turn it down and if it came up again then they would definitely cut the power. And this is in the middle of the concert. So I would be telling people "I'm sorry, I can't turn it up because they will cut the power if I do that." And having to explain that to every person who complains in a crowd of 3000 people is a burden which makes it very hard for me to do my job as an integral part of the performance.

THE COURT: As you sit there today, Mr. Thompson, do you specifically recall at some time a Parks Department official

saying that he would cut off the power if a reduction was not made?

(85) THE WITNESS: I do specifically remember that.

THE COURT: Can you tell me what year that occurred?

THE WITNESS: Actually, it was a police officer and not a Parks Department person.

THE COURT: All right. Can you tell me when that happened?

THE WITNESS: I believe it was 1985.

Q. Do you ever get any input about the sound levels from the bands?

A. Oh, the bands always want it louder, always. The bands never complain that it's too loud.

Q. Earlier in your testimony you spoke about that you were involved in the promotion of the event as well, not only the soundboard, is that correct?

A. That's correct.

Q. Do you recall approximately how many bands and speakers were at the 1985 concert?

A. Somewhere around five to six bands and approximately the same number of speakers.

Q. How many hours, approximately, did the concert run?

A. '85 we're talking?

Q. Yes, in 1985.

A. I could be wrong, but I think it was noon to 6.

(86) Q. Was that an hour that you had agreed upon, that was in your discretion the length that the concert should be, or did you limit the hours for other reasons?

A. We limited the hours for other reasons. In terms of attendance, our group would be a lot better off if we started it later and—

THE COURT: No, that really doesn't respond. The hours were limited for other reasons?

THE WITNESS: Yes.

THE COURT: If you would like me to know what those other reasons were you can put questions?

Q. What were the other reasons?

A. We were told that it had to end at 6 by the Parks Department. And so we made it start earlier so that we could fit all the people that wanted to play. We wanted to get an accurate representation of the culture in New York, which is impossible, we know, but we try to have as broad of a range of cultures available, and so to do that we had to start it earlier, say at noon, when actually there isn't anybody in the park.

Q. Have you ever had to ask a band not to play because of the hours?

A. Yes.

Q. Have you ever had to ask a speaker not to speak because of the limitation of hours? In 1985. Let's keep (87) it there.

A. I believe that more people ask to speak than we can put on, but I can't be specific as to who was turned down.

Q. How about in 1986? Did you have bands that you wanted to put on but could not or speakers that you wanted but you weren't able to because of time constraints?

A. Yes.

Q. Do you recall how many more hours you would like the concert to be or you would have liked the concert to have been, rather, in 1986?

A. I think that the optimum timing would be starting at 1 and ending at 8.

Q. Have you ever discussed the issue of the hours with the Department of Parks?

A. Personally or—

Q. In 1986.

A. I believe in 1986 the person who had filed the permit had not asked for it to go to 8 o'clock and as a result we only got what we had originally asked for. So it wasn't really—it was more an internal problem with us that we didn't go till 8. If we had asked for 8 then we probably would have gotten it—after we sued, of course.

MR. PINES: Object to the response. It calls for speculation.

(88) THE COURT: I will limit the answer to in 1986 they got what in fact they asked for.

Q. How about in 1985? Were there any discussions about hours, what you wanted?

MR. PINES: Object to the form of the question. There is no indication of who we're talking about.

MR. KINIGSTEIN: I will withdraw it. I will rephrase it.

Q. In 1985 were there any discussions between Rock Against Racism and the City of New York concerning the hours of the concert in early May at the bandshell?

THE COURT: You must limit your answer, Mr. Thompson, to what you have personal knowledge of.

THE WITNESS: Right.

A. I can't remember if it was the year when they told us it would be a two-hour concert or if it was the year when they told us that we would have no concert, but it was one of those two things.

Q. You also testified just a little earlier about the promotion, promoting the event itself. You indicated you did some postering. Could you describe what you do, let's say what you did in 1985, to promote the event yourself?

A. I participated in as many events as I could that were non-RAR events but were happening right around—(89) right up until that time. I would basically show up at other people's concerts with posters and hand them out or I would have previously postered the area of the concert or whatever rally or whatever it was. When I have the time I try to organize groups of other people to go out and do outreach through leafleting or postering.

Q. Do you know how much time you usually spend on these activities of promotion?

A. Oh, I—well, I basically spend all my free time trying to promote it at the last minute. I can't be sure of how much time that was. That's your question. I don't know.

Q. You don't have an estimate of hours then?

A. It's hard to really estimate. I just know that when I'm done with all my other responsibilities, then I will do the postering, because no one else—because it seems like no one else is doing it. It's very hard to get people motivated to do that.

THE COURT: But you are a volunteer as far as RAR is concerned?

THE WITNESS: Right.

THE COURT: What is your regular employment, Mr. Thompson?

THE WITNESS: My regular employment is I am a sound reinforcement consultant and I design systems for (90) people who want to put a sound system in a restaurant or a club or an outdoor form, whatever they have, or I will hire myself out to work for another sound company with their equipment, just my expertise.

Q. Mr. Thompson, have you seen the 1986 Naumburg Bandshell regulations?

A. I have glanced at them, yes.

Q. Are you familiar with the part of the regulations which call for a city sound system to be used at the concerts?

A. You mean a city-hired sound system.

Q. I'm sorry. A city-hired sound system, correct.

A. Yes, I am.

Q. Have you seen the sound systems that the city indicated they were using?

A. The four sound systems that they—

Q. Right.

A. Yes.

Q. In your opinion, are those sound systems—

THE COURT: I will accept him as an expert, but I want you to phrase the questions properly. First of all, ask him does he have an opinion as to whether or not there is such and such a proposition, and if he says yes, then you may ask him what that opinion is.

* * *

(98) Q. Do you recall how much money you make at these events and how much has to be borrowed?

A. We generally make somewhere between 500 and 1000 when we do a benefit in a small club and 300 people come.

Q. In 1986, could you just give us the breakdowns for putting on the 1986 Rock Against Racism—

A. That was just about exact, because that's the year I remember the clearest and those are from which I gave you the figures.

Q. So the same as—

A. It's almost the same, yes. The poster thing could vary, but it's almost the same.

THE COURT: Where does your sound equipment come from?

THE WITNESS: The sound equipment is partly owned by myself and it's partly rented, depending on what we—what is deemed necessary.

THE COURT: Is that included in the $350 figure for stage equipment?

THE WITNESS: Yes, it is, correct.

Q. Just on that particular question, in the $350 of rental equipment, is any of that special type of equipment (99) for any type of special effects?

A. I will give it to you exactly. The specific instruments that the musicians request—I mean, not the instruments themselves, but the specific instrument amplifiers.

See, the way we work it is we can't afford to pay the bands. So we set it up as a volunteer thing where—first of all, if they have to bring their own equipment then they have to charge us very—you know, big expenses. So what we do is we rent one setup which they all share, and to do that we have to provide what they need and what they request.

So we have to take the request of the band and if they want a specific keyboard or a specific amplifier or a specific drum set we have to get those things in order to get them to play for no money.

Q. Can you recall in 1986 specific equipment that you had to get for a band?

A. Yes. We had to get an Acoustic 370 bass sound, we had to get a Roland Jazz Chorus guitar amplifier, we had to get a Juno

6 keyboard with a Cerwin Vega amplifier, we had to get a seven piece Tama drum set with Ziljian cymbals.

Q. Do you remember which band that was for?

A. Basically what I try to do is I talk to all the bands, I get all their needs, and I arrange a common stage (100) setup that is agreeable to all of them.

Q. The obtaining of these special—it sounds like some of them are musical instruments.

A. Yes, basically the drum set and the keyboard actually are musical instruments.

Q. And the other items, what are they?

A. The other items are the actual instrument amplifiers.

Q. Are they attached to a soundboard?

A. Yes, they are.

Q. Do you manipulate the dials on those instruments?

A. No, the musicians do.

Q. The musicians do?

A. That's correct.

Q. Tell me, how does it interface, if in any way, with your board?

A. It's connected via a device called a direct box or the amplifier is miked, either—well, that will suffice.

Q. If that equipment was unavailable would the band play?

MR. PINES: Objection, your Honor. Speculation.

THE COURT: No. He may have an opinion. I will permit it.

A. There is no way that a band will play for free (101) unless we provide the equipment, and we can't afford to pay the expenses of every single band. So the answer is if we only had one band, yes. If we want to have a mix of styles, then no.

Q. How many bands did you have in the 1986 concert?

A. I believe it was six.

Q. And how many in your opinion would not have played if you did not have the equipment they requested?

MR. PINES: Your Honor, I have to object. There is no foundation that this witness has in fact that knowledge. He can be asked as to whether they told him specifically whether they would not play, but this is speculation on the state of mind of the willingness of the performers to play.

THE COURT: Well, he has negotiated with the bands.

But in framing your answer, Mr. Thompson, I want you to rely, to the extent it exists, upon what band representatives said to you specifically. If you have no such foundation for answering counsel's question then you should not do so.

I hope that's clear. Do you remember counsel's question?

THE WITNESS: Yes.

THE COURT: You may answer.

(102) A. I am trying to think of a specific band. I believe Johnny Colon Salsa Orchestra. Johnny told me that his band would not be able to play unless we provided a specific list of—in fact, all of the bands only agree to play when I tell them that we are going to provide the equipment that they need. That's just—that's it.

I mean, there is no way to elaborate on that. They won't bring their own stuff unless we pay them big money, and that means up

to $1000 per band. These are all professional bands. This is the way they make their living. The only way I can persuade them to come and play for free is the fact that it's a Rock Against Racism festival, that there will be a lot of people there, and we're setting the whole thing up so they just walk up with their music and their drumsticks and we will have everything for them. That's the only way I can get them to show up.

Q. Let me give you a hypothetical. If you were required to pay $2000 for liability insurance would you have been able to put on the Rock Against Racism concert in 1986?

A. This is a nonrefundable expense?

Q. Right.

A. No, there is no way we could come up with that kind of money.

* * *

(121) Q. Mr. Thompson, if there were no sound regulations applicable to the bandshell would you attempt to limit the upper level of sound generated at the Rock Against Racism event?

A. I would. And if I might elaborate on that. There is a device called a limiter or a compressor which we have and we utilize in our sound system. It's designed to limit peaks and/or compress the program material so that if an unexpected peak should come through, in other words, if someone would drop a microphone against a floor or scream in the mike all of a sudden, this compressor would automatically limit the sound, and I set it just above the operating threshold, so that if anything a little bit louder than my designated program material should attempt to come to the sound system it would automatically be attenuated.

Q. So you acknowledge that there is a level beyond which sound amplification would be unreasonably loud for the bandshell?

MR. KINIGSTEIN: Objection.

THE COURT: Sustained.

Q. Given the fact that you do limit the sound that is emitted from the performances of RAR at the bandshell, do you recognize that there might be a sound level that's unreasonable for that area?

(122) MR. KINIGSTEIN: Objection.

THE COURT: I will let him answer that.

A. I think a volume that would cause people's ears to bleed would be too loud.

MS. LIBERATORE: Your Honor, may I have the answer stricken? It's not responsive to the question.

THE COURT: The question was not quite that precise. He is answering in his own way. I will let it stand.

Q. So you're saying that nothing less than that level would be unreasonably loud?

A. Not really. I would say that a painfully loud—if it was painfully loud that would be unreasonably loud.

Q. So then your only disagreement with the Parks Department is as to what level should be set for the bandshell area?

MR. KINIGSTEIN: Objection.

MS. LIBERATORE: He has established that he believes there is a level beyond which there should not be a performance.

THE COURT: I think it would be more helpful to me if you would direct his particular attention to a particular regulation and then ask questions on the basis of that. Read him what you have in mind from the regulations.

(123) MS. LIBERATORE: I withdraw the question.

THE COURT: All right.

Q. Isn't it true that you rented a sound mixing board for the 1981 Rock Against Racism event at the bandshell?

A. We rented—we subcontracted the entire job to a company called Three R Sound in Brooklyn.

THE COURT: This was 19?

THE WITNESS: '81.

Q. So it's your testimony that you rented the services of a sound engineer to run the soundboard in 1981?

A. That's correct.

Q. Isn't it your testimony that there isn't anyone in Central Park at noon on a Sunday, on a sunny weekend day in May?

MR. KINIGSTEIN: Objection, your Honor.

THE COURT: He certainly said nothing like that now.

Q. If I can draw your attention to the testimony you gave yesterday, you said there is no one in the park at noon, is that correct?

THE COURT: I will let the witness deal with it.

A. I did say that. What I meant was—when I said no one, I meant people who have come for our concert. The park does have other people in the park at that time.

(124) Q. Isn't it also true that you said that the audience that you seek to reach is best reached after 1 o'clock in the afternoon?

A. That's the point I was making, yes.

Q. Isn't it true that RAR was permitted to hold its event from noon to 7 p.m. last year?

A. I believe so.

Q. Isn't it also true that you arrived at the park at 6 a.m. to set up for a noon concert?

A. That's correct.

Q. Was that in agreement with the Parks Department?

A. To the best of my knowledge.

Q. Is it your testimony that there is one knob that controls master volume on the soundboard that you pointed out to the police? Was it your testimony yesterday that you pointed out a knob on the soundboard that was a master of sound volume knob to a police officer?

A. In 1983.

Q. There is no such knob now, is that what your testimony is?

A. I was just about to say that different mixing boards are configured differently and not all have this master control. That particular year we had an extremely simple and user-friendly device which did have a master volume controller on it.

(125) Q. So now there is no simple way on your soundboard, the way it's configured today, to control the volume?

A. No, I don't mean to say that. It's just as simple, but it's not quite—it's just a different board.

Q. Is there more than one knob now?

A. There is more than one knob, yes.

Q. How many knobs are there?

A. I would say—in just the mixing board or the outboard equipment included?

Q. Just leave it at the mixing board.

A. What's 22 times 8?

Q. There are 22 times 8 knobs to control just volume.

A. 22 times 8 times—I would say 22 times 8 plus 30. If you can do that, that would be—

Q. That's how many control just the volume?

A. Just the volume? Yes, just the volume.

Q. So then there is no simple way to control the volume on your soundboard if you have to touch 22 times 8 knobs plus 30?

A. No, there is a simple way to instantly attenuate the volume.

Q. Which is?

A. Which is the master volume sliders.

Q. So now there is a master volume slider and not a (126) knob?

A. Correct.

Q. And you can touch that at a moment's notice, you don't have to touch 24 other knobs?

A. That's correct.

Q. It's just a sliding dial type of instrument?

A. That's right.

Q. And there is only one of those?

A. One of those for each send to each speaker array.

Q. How many does that come to total?

A. Well, there is a short throw section for the mains, which is the audience, there is a long throw section, which is the audience standing behind the people who are standing in front of the

stage, and then there are the monitor sends, which would be side fills, and the floor wedge sends, which can be individualized if necessary. So it could be up to eight with our particular board.

Q. So then it's your testimony that there are eight knobs that control—we will call them sliding dials, if you wish—that control the volume?

A. You're primarily concerned with the volume that reaches the audience. So I would say there are two knobs for that currently.

Q. Very well. Isn't it also your testimony there are 200 to 300 knobs to be adjusted in generating the (127) particular sound you want aside from the master volume control knobs?

A. That would be close enough.

Q. Are you at all familiar with the sound company New York Sound?

A. No.

MR. KINIGSTEIN: Objection, your Honor.

THE COURT: I am not quite sure where counsel is going, but I will let the witness answer.

A. No.

Q. So then you have no way of knowing what quality equipment they provide at any performance?

A. I would say that would be true. A list of equipment doesn't tell you anything about the quality of how it's interconnected.

Q. That's not my question. My question is—

A. But it could malfunction easily if it was interconnected improperly. A list of equipment doesn't tell you how professional it is.

MS. LIBERATORE: Your Honor, that's not responsive to my question.

THE COURT: Put your question again.

Q. My question is, are you at all familiar with the quality of equipment—

A. Of New York Sound?

(128) Q. —of New York Sound?

A. No.

Q. Thank you. Have you ever attended an event at the bandshell in 1986 at which New York Sound provided sound for that event?

A. No.

Q. So then you have no way of knowing how they produce an event, do you?

A. That's correct.

MS. LIBERATORE: Could I have a moment, your Honor?

THE COURT: Yes.

(Pause)

Q. Isn't it true that in each year that Rock Against Racism had an event at the bandshell that the cleanup bond was refunded to Rock Against Racism?

A. You're talking about 1986?

Q. I am talking about every event that you are familiar with.

A. Within six months.

Q. It was refunded?

A. Within six months.

* * *

Transcript of Proceedings on March 23-25, 27, 30, 31 and April 1, 1987

Testimony of William Dalton, Witness on Behalf of Defendants

(298) WILLIAM DALTON,

called as a witness by the plaintiff, having been duly sworn, testified as follcws:

THE COURT: I think in fairness, Mr. Pines, I should say to you I appreciate the defendants coming in with a witness now, taking the witness out of the ordinary order of proof, and I will hear him without prejudice to the defendants' right to argue as a matter of law that at the conclusion of the plaintiff's evidence there was no case to answer.

MR. PINES: Thank you, your Honor.

DIRECT EXAMINATION

BY MR. PINES:

Q. Mr. Dalton, can you tell me what your current position is in the City of New York?

A. I am chief of Urban Parks Service for the New York City Parks Department.

Q. Are you an actual employee of the Department of (299) Parks and Recreation?

A. No, I am paid by the New York City Police Department.

Q. What is your rank in the New York City Police Department?

A. I am a sergeant, New York City Police Department.

Q. Would it be fair to say you're on loan then to the Parks Department from the New York City Police Department?

A. That's correct.

Q. What are your responsibilities in the Department of Parks and Recreation?

A. I oversee the operations of the Parks Enforcement Patrol, the Urban Park Rangers and the communications division for the Parks Department.

Q. What is the Park Enforcement Patrol, please?

A. Park Enforcement Patrol are peace officers deputized by the New York City Police Department who enforce the park rules and regulations along with the laws and regulations of the city and State of New York.

THE COURT: You say they are deputized by the NYPD?

THE WITNESS: Yes, sir.

THE COURT: Are they police officers?

THE WITNESS: They are peace officers, sir.

(300) THE COURT: What's the difference between a peace officer and a police officer?

THE WITNESS: A quick definition would be that a police officer has the power to be a police officer 24 hours a day, a peace officer has the power while he is working. There is a search and seizure, stop, question and frisk difference also. But those are the only two differences. They are also unarmed, sir.

THE COURT: Is a peace officer an employee of the city on a full-time basis?

THE WITNESS: Yes, sir.

THE COURT: Okay. Thank You.

Q. Is it fair to say—you call them PEP officers, do you not, the Department of Enforcement Patrol?

A. That's correct.

Q. —that the PEP officers have the power of arrest?

A. That's correct.

Q. How long have you been with the New York City Police Department?

A. At this point, I have 17 years, a few months.

Q. And how long have you been—

A. I'm sorry. Let me correct that. Eighteen years and a few months. I will have 19 years in June.

Q. In June?

(301) A. Yes.

Q. How long have you been with the Department of Parks and Recreation?

A. Since 1981.

Q. Have you had any responsibilities in connection with the Rock Against Racism concerts from 1983 through to 1986?

A. Yes, I have.

Q. Have you been on-site during those events?

A. Yes, I have.

Q. At each of the events from 1983 through '86?

A. That's correct.

Q. Has your responsibility been the same for each of these concerts?

A. Yes, it has.

Q. Can you describe what that responsibility is?

A. Represent the Parks Department at these events, sometimes as the senior person, sometimes not, and to direct the security and the safety—and protect the safety of people at events throughout the park.

Q. When you say the safety of people at events, does that include both audience and RAR performers and sponsors?

A. Everybody. That's correct.

Q. Let me direct your attention to the RAR concert in 1986. Is it correct you were on-site at that event?

A. That's correct.

Q. Were any other events going on in the park, special events, in 1986?

A. The Cerebral Palsy Bikethon takes place the same day.

Q. Was RAR your primary concern on that day?

A. No, it wasn't. The Cerebral Palsy Bikethon was our primary concern that day. We have about 2000 young riders who are riding around the park for money, to raise money for cerebral palsy, and most of our efforts are in the protection of those riders, so cars don't come in the park or they don't collide.

Q. Do you know approximately how many people attended the RAR event in 1986?

A. I can tell you approximately. Less than a thousand.

Q. Was that based upon you personal observation?

A. On my personal observation.

Q. Do you know whether there were any complaints about sound levels received by you or anyone with whom you worked in connection with the 1986 RAR event?

A. Yes, there were complaints.

Q. Do you have any recollection specifically about the exact addresses from which these complaints were received?

A. Most of them from the west side of the park. I remember One Lincoln Plaza, or up in that area. It was so far away from the park I was surprised to hear the address.

Q. Are you speaking about Lincoln Plaza?

A. There was one address that was a few blocks away from—most of the complaints would come in with Central Park West addresses or on side streets. This one was quite always up.

* * *

(314) Q. You testified you have been present at the RAR events over a period of several years, from at least 1983 on, is that correct?

A. That's correct.

Q. During your involvement on-site at these events have you ever been aware of any disputes between either park officials or police officers and RAR sponsors with respect to sound level?

A. Yes.

Q. Can you describe any of those incidents?

A. I can recall the Police Department asking a representative of RAR to turn the sound down and the person from RAR objecting.

(315) Q. Do you know who that person was?

A. Yes, I do.

Q. Who was that?

A. I believe his name is Dean Tuckerman.

Q. Can you describe to the best of your recollection the nature of the discussion on the issue of sound?

THE COURT: Can we fix the year?

Q. Is it possible you have a specific recollection of the year?

A. I can't give you a specific year. I'm sorry.

Q. Do you know whether Dean Tuckerman was involved with RAR on-site in 1986?

A. I don't recall seeing him in '86.

Q. So that it's your belief that this incident did not occur in '86.

A. It did not occur in '86.

Q. Let me ask you this: Did these disputes occur over more than one year or only one year, to your recollection?

A. Two years, I would say.

Q. Between 1983 and 19—

MR. KINIGSTEIN: Objection, your Honor.

THE COURT: Yes. Rephrase it.

MR. PINES: I'm sorry.

(316) Q. Does your experience go back beyond 1983?

A. Yes, it does.

Q. To what year?

A. 1981.

Q. Can you limit it at all between 1981 and 1985?

A. I have to say they all come together in my head. I can't separate them.

Q. But it is your best recollection that it occurred—is it two occasions?

A. Two occasions.

Q. Could it have been more or is it—

MR. KINIGSTEIN: Objection, you Honor.

THE COURT: Sustained.

Q. Just describe the nature of the discussion on the sound level to the best of your recollection.

A. I recall a senior member of the Police Department on the scene at the time requesting Mr. Tuckerman to have the sound turned down and Mr. Tuckerman objecting to that.

Q. Did he in fact turn the sound down?

A. At times the sound was turned down, at times it wasn't.

Q. Can you be more specific about that?

A. It was an ongoing request by the Police Department because the sound levels would change constantly (317) during the day.

Q. When the Police Department requested Mr. Tuckerman to turn down the sound would he do so at that point?

MR. KINIGSTEIN: Objection, your Honor.

THE COURT: To the extent that the witness was in a position to observe what Mr. Tuckerman did, he may describe it to me.

MR. PINES: Let me rephrase the question.

Q. I understand you can't specifically say what year you're speaking about. Are you, however, referring to a specific incident?

A. Yes, I am.

Q. Regardless of the particular year, I am asking you about that incident, to focus on the specific incident that you now have

in mind, when you testified the police told Mr. Tuckerman to turn the sound down.

MR. KINIGSTEIN: Your Honor, I don't know what year we're talking about here. I know it's somewhere between '81 and '85.

THE COURT: Yes.

MR. KINIGSTEIN: I think to continue with this line of questioning we should know at least is it '81, '82 or some frame of reference here.

THE COURT: Would you like counsel to put some (318) leading questions to the witness in the possibility of sharpening the focus? He has given his best present recollection, I think.

MR. KINIGSTEIN: All right. I will allow some leading questions to establish the year.

THE COURT: You may lead if you like, Mr. Pines.

MR. PINES: Thank you.

Q. I will try to help you fix this in time subsequently. What I would like to do, however, is to simply continue with your narrative with respect to this particular incident, if we might.

When the Police Department asked Mr. Tuckerman to turn the sound down is it your recollection that he did so or that he did not do so every time he was requested to do so?

MR. KINIGSTEIN: You Honor, I object. I agree to leading questions to establish the year. I would still like to know what year. I agreed to leading questions for that purpose.

THE COURT: Counsel asked if he turned it down or not. That is not a leading question. I will take the answer.

A. There were times when Mr. Tuckerman would object but have the sound turned down, either himself or have somebody

turn it down, and at times he would have to be (319) asked a few times by the police, who would—he would ultimately go over and have it turned down, and there were times when it wasn't turned down.

Q. Did you have occasion to view the actual mixing board during this event, during this incident you're talking about?

A. I know of the mixing board, yes.

Q. And could you see what Mr. Tuckerman would do when the request would be made or was made during this incident?

A. No, I couldn't.

Q. Subsequent to his turning the sound down did you observe the sound levels rising again?

A. Yes, I did.

Q. Would the issue arise again, did the police speak to Mr. Tuckerman again about the incident?

A. That's correct.

Q. Did this repeat more than once; in other words, a request, the sound being turned down, the sound going back up again and the request being made again?

A. That was a constant scenario, yes.

Q. And is it this pattern—

THE COURT: No, we are leading now.

Q. Did this occur in more than one year?

A. Yes, it did.

(320) Q. Directing your attention to 1986, do you know whether either police officers or PEP officers prohibited the distribution of leaflets during the RAR event?

MR. FOSBINDER: Objection.

THE COURT: The witness may answer on the basis of his own observations.

A. I don't know of anybody stopping anybody from distributing leaflets or literature.

Q. Do you know whether any officers, police officers or PEP officers, prohibited—

MR. FOSBINDER: Objection to the form of the question. He can't possibly know whether or not they did something. He can only have knowledge of someone doing something.

THE COURT: Recast it in terms of his own observations.

Q. Did you observe any police officer or PEP officer in the act of prohibiting banners being displayed at the RAR event?

A. No, I don't recall that.

Q. Do you know whether banners were prohibited by officers under your command at the 1986 event?

A. We have rules for all events and banners that we go along with. Of course, somebody could have said something to somebody regarding a banner.

(321) MR. KINIGSTEIN: Objection, your Honor. It's not responsive to the question.

THE COURT: Well, what someone could have done is not probative of anything. I don't know what the rules about banners means or whether this witness is in a position to say that any instructions were given consistent with those rules on this occasion. Counsel may wish to pursue that further.

Q. When you said "We have rules," what did those rules provide with respect to banners in 1986?

A. During the time of preparing a special events permit and the negotiations that go on prior to a special event the Park

Department requests to see all banners that will be displayed, and we allow numbers of banners, so that we don't end up with—if I could refer to like the Tour De France, you know, the advertisements all over, we certainly don't want that type of, you know, infringement on everybody else's events, let's say. To tack things up on trees would be something that we would look—we would not allow anybody to put a nail in a tree. They could tie something on a tree. As a matter of fact, that I know did happen because I did talk to somebody about where they were attaching something to a tree.

Q. This is in 1986?

A. 1986.

(322) Q. And that was permitted?

A. I believe we let them hang it on a barrier, a French barrier, a metal barrier that was around a tree.

Q. So is it fair to say then that banners were permitted in 1986 at the RAR event?

A. Oh, yes, they were permitted, sure.

Q. Do you know personally whether anyone who sold T-shirts at the RAR event was directed by police officers or anyone under your command not to do so?

A. Not at all. I observed people selling T-shirts or giving out literature. That was just happening. We knew it.

Q. To your personal knowledge, do you know whether anyone sold food at the 1986 RAR event?

A. There was one group, and I believe it was the same group that had the banner—I don't recall exactly what it was; something about Indian Nations maybe—who started out selling food. We told them that it was against regulations to sell without a concessions permit and a Board of Health license. We said "Of course, you can distribute food, you know. You can't sell it." And

they continued giving out the food throughout the day but we didn't see them sell it any more after we told them that.

Q. Are you familiar with the laws of New York City regarding the sale of food in parks?

(323) A. Yes.

Q. Do those laws permit you to close down vendors of food in the park?

A. Yes, to confiscate and summons.

Q. Could you have in fact confiscated and issued a summons to the persons who was selling the food?

THE COURT: Is this really a part of this case, Mr. Pines?

MR. PINES: Yes, your Honor, I believe that it is. To the extent that the plaintiffs have suggested that there is some animus specifically directed toward RAR, I believe it is very much probative of the lengths to which the Parks Department has in fact—

THE COURT: All right. Save the argument. Put the question.

Q. Could you in fact have issued a summons and confiscated the food?

A. Yes, we could have.

Q. But you did not?

A. We didn't, no.

Q. Do you have any opinion about RAR personally?

A. Another event.

Q. It has no special significance to you?

A. No, none at all.

Q. Are you offended by their music?

A. I have a 17-year-old and a 20-year-old daughter. It's hard to offend me with the music.

THE COURT: At least, it's fair to say you're used to it.

Q. Do you find the message of RAR, aside from the music, offensive?

A. Not at all. There were things of my personal opinion that were very worthwhile and I agree with and that's fine.

Q. Are you in any way displeased that RAR held an event in 1986?

A. No, not at all.

MR. PINES: I have no further questions.

CROSS-EXAMINATION

BY MR. FOSBINDER:

Q. Could you clarify for me your responsibility once again over the PEP officers? I didn't quite follow that. You're in charge of them, is that it?

A. Over the years my title has changed and every year I may have played a different role over the PEP officers. But I was usually in charge of the PEP officers at the event.

Q. Was this true in 1985 and '86? You were there?

A. 1985 I was not at the event full time. There were others there that would take on the normal supervision (325) duties, whatever has to be done.

Q. So it's possible that any of these things that were claimed to have been done could have happened while you weren't there in 1985?

A. Yes, it's possible.

Q. PEP officers have the authority to issue a summons, is that correct?

A. That's correct.

Q. And they can only issue a summons or threaten to issue a summons if someone is violating a statute, a law, or a rule which has the force of law, is that correct?

A. If somebody is in violation?

Q. Let me rephrase that. Would it be improper for a PEP officer to threaten someone with arrest if they weren't violating a law?

A. I guess it depends on the circumstances. We will use warning summonses, if you want to call that threatening, in general, distribute literature in a park. An example is a playground, where there are no dogs allowed in a playground, and the sign was just put up.

Q. Is there a law that says there are no dogs allowed in a playground?

A. Yes, there is a law. When there was a sign up that said dogs must be on a leash, we would change the sign, we would issue warnings to the people who are walking their (326) dogs, so that they don't end up getting a summons and saying that they didn't know anything about the law.

Q. It would be wrong for a PEP officer to walk up to someone and threaten to arrest them if they weren't observed violating a law, isn't that true?

A. I would guess, from the way you describe it, you're right. I would have to know the specifics of what you're talking about.

Q. Can you tell me where you find the law that the PEP officers are allowed to enforce, what specific criminal code, civil code, what—

A. PEP officers enforce all the laws of the State of New York, all the laws of the City of New York, health, sanitation, Parks Department rules and regulations, virtually everything. I

don't know about fish and game laws. I think that's the only thing that we need an outsider for.

Q. Have PEP officers confiscated radios and boom boxes in the so-called quiet zone in Sheep Meadow?

A. Yes, they have.

Q. Could you give me some idea of what law those people were breaking?

MR. PINES: Your Honor, I object on the grounds of relevance.

THE COURT: Sustained.

(327) MR. FOSBINDER: The Sheep Meadow has come up repeatedly as a so-called quiet zone and the city has, I think it's fair to say, implied that there is some sort of law or regulation that governs the conduct of Sheep Meadow and that they were somehow infringing upon that area.

THE COURT: I am not concerned with arrests for this kind of box, Mr. Fosbinder. I sustain the objection on the ground of relevance.

Q. With regard to the complaints that you previously testified about, do you have any knowledge as to whether the person taking the complaint asked the complainant whether or not they were present in the park when they heard the noise or whether they were at home when they heard the noise, the sound?

A. No, I don't.

Q. Do you have any idea whether they asked the person who complained whether they objected to the content or whether they objected to the perceived loudness of the event?

A. No, I don't.

Q. Do you know how many complaints were received total regarding noise generated in Central Park in 1985?

A. No, I don't.

Q. Do you have any idea of how many were received total in 1986?

(328) A. I'm sorry. I don't.

Q. Do you have any idea whether the number of complaints received on the Sunday of the RAR event in total regarding noise from the park was disproportionate to any other Sunday?

A. I can't say that it is. I believe it is.

Q. What do you base that belief upon?

A. Because we received complaints that are notable. We don't really receive too may complaints for anybody else. Roadrunners doing their announcements seem to be the once that we get complaints about. We have to make them turn their speakers around or turn the volume down.

Q. Could you tell me what sort of sound system is specifically used for the roadrunning events?

MR. PINES: Your Honor, I object on the grounds of relevance.

THE COURT: No, in the context of noise complaints I will let him answer.

A. It varies according to event.

Q. So you don't know whether those sound systems are a tenth as powerful or ten times as powerful as the RAR system?

A. No, I don't.

Q. Were you involved in any way in the permit procedure for RAR's permit application in 1985?

(329) MR. PINES: Objection, your Honor. Beyond the scope of direct.

THE COURT: Well, yes. But I will permit him to extend the scope subject to further inquiry.

A. No, I had nothing to do with the permit.

MR. FOSBINDER: If I could have just a moment.

THE COURT: Yes.

(Pause)

BY MR. FOSBINDER:

Q. You spoke about officers requesting RAR to turn down the sound at various times. To the best of your recollection, was that phrased as a friendly request or was it implied that a summons would be issued if they didn't turn it down?

A. I would say that it was an indication that they were in violation or they were exceeding the sound limits.

Q. What rule or law were they violating?

A. I can't tell you specifically the regulation.

Q. Are you familiar with the Naumburg Bandshell regulations?

A. I have seen them, yes.

Q. The copy that you are familiar with, did that copy in 1986 include a provisions that stated no banners and no distribution of literature?

A. I don't recall.

(330) MR. FOSBINDER: May I approach the witness?

THE COURT: Yes.

Q. Could you identify for the record what you're looking at?

A. Document number 86-7389, United States Court of Appeals—

Q. It's open to what section? What is that?

MR. PINES: Your Honor, I object on the grounds of relevance. This witness has indicated only a vague familiarity. His testimony about—

THE COURT: I understand his testimony. This may refresh his recollection. I will permit it.

Why don't you simply state for the record, Mr. Fosbinder, what you put before the witness.

MR. FOSBINDER: I put before the witness a copy of the Naumburg Bandshell regulations as found in the appendix of the exhibit.

THE COURT: Just so.

Q. Is it part of your duties to be familiar with all the laws and regulations which the officers under you enforce in Central Park?

A. I try to be.

Q. Can you explain to me why these regulations weren't in force, if, as you say, they weren't?

A. We try to use discretion as much as we can so (331) that we don't cause problems when not necessary.

Q. Thank you. Can you tell me, in 1983 were you present when the concert of event ended?

A. I couldn't tell you in 1983 if I was—

Q. Do you have any recollection of police officers pulling the plug in 1983 or 1984 on the sound system?

A. I do recall the police officers pulling the plug, as you say, but I don't—

Q. Did that occur before or after the time on the permit ended?

A. After. Any time that I was there, it was always after the time indicated on the permit.

MR. FOSBINDER: That's all.

THE COURT: All right.

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Transcript of Proceedings on March 23-25, 27, 30, 31 and April 1, 1987

Testimony of Gary Floyd, Witness on Behalf of Defendants

(336) GARY FLOYD,

called as a witness by the defendants, having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. PINES:

Q. Mr. Floyd, are you currently employed?

A. Yes, I am.

Q. Can you describe how you're employed?

A. Yes. I work as a consultant and as a designer, running essentially a self-employed practice, advising a number of clients in regard of performance and theatrical type events and their needs for sound, for lighting, for staging, as well as the production aspects.

Q. Can you describe your experience in that area?

A. Well, I have approximately 17 years background from the first time I started working in this area. I have a master's degree in the theater arts area, with (337) specialties in design, and also worked as a recording engineer.

I have worked for a number of different companies over the years. I have spent a number of years working for the Smithsonian Institution as far as staff member, and I have also worked for a number of universities.

Q. Can I ask you what work you did in connection with the Smithsonian Institution?

A. Yes. I was in charge of site planning and technical coordination, including audio for all the Smithsonian's festival American Folk Life events on the National Mall. I also worked with the inaugural events as far as providing the staging and sound activities for the concerns that took place both indoors and outdoors.

Q. Can you continue with your employment history?

A. Let's see. Would you like a resume listing?

Q. Did you work for the State of North Carolina?

A. Yes, I have. I have worked for the State of North Carolina on several occasions.

Q. Can you describe—

A. Most recently, last fall, working as production manager and associate producer. The events I worked on at that time were for something called The Year Of The Native American.

Prior to that time I worked for the state's (338) Department of Cultural Resources, producing the state's 400th anniversary events at Manteo, North Carolina. These involved sound staging, design. We set up a number of staging areas for such dignitaries as Princess Anne, Walter Cronkite. We had close to half million visitors in that geographic area for a one-week period. We provided audio reinforcement to multiple locations. I was in charge of selecting the audio type—let me rephrase that. The audio firm to be hired and contracted with provides such work. I was in charge of the quality control for all of that.

Q. Can you describe the outdoor sites you worked at in connection with you employment for the State of North Carolina?

A. Well, when you say sites, are you referring to the work sites?

Q. Yes.

A. Okay. I was based out of Raleigh. We worked events in Raleigh—

Q. Let me stop you and possibly direct your attention. In terms of outdoor sites at which you staged events, can you describe some of those?

A. Okay. We were principally involved in siting outdoor events. Some of these involved multiple staging. For instance, we did some events at Duke University, used (339) the entire university campus. We provided stages that had back-to-back siting, we had stages that were facing each other. We even worked with the entire stadium there. We even had some proposals up to the point of doing major rock and roll concerts for 50,000 stages as small as, you know, 50 people with a single performer. All of these were typical of the types of sites and of the events we did throughout the state.

Q. In connection with your employment as you have described it, were you called upon to evaluate the sound systems, a variety of sound systems to be used?

A. Yes, we—in fact, most of the companies that I was involved with were the ones that came to my attention because of interest in the work the state was doing, and so we had a large number to sort out. I was responsible for making those decisions and sorting out which inventories looked adequate for a given site, which inventories would meet the needs that we had from the performers. We also had a number of companies that we had to work out contractual arrangements with as far a residuals, TV rights, that sort of thing.

Q. Did your employers rely upon your opinion with respect to the relative qualification of different sound amplification provided?

A. Almost implicitly.

(340) Q. Directing your attention now to the events of this litigation, can you recall the first time you had any contact with Joseph Killian?

A. Yes, I can. I was introduced to Joe at a meeting where I was actually working with another group that was meeting with Joe in regard to the use of the bandshell site.

Q. Did this meeting have anything to do with the consideration of various firms to provide sound for the bandshell?

A. No, at that time, my first meeting, that did not, but it—

Q. That's fine. We will get to that in time.

A. Okay.

Q. When was this, if you recall?

A. This was approximately January of last year.

Q. 1986?

A. Right.

Q. At that time did you speak with Mr. Killian about the possibility of reviewing different sound systems for the bandshell?

A. No, I did not. He had asked me a few questions about sound systems and sound companies at that time, but that was the limits of I think our conversation at that time.

(341) Q. When was the next time you had contact with Mr. Killian?

A. I think it was approximately three, four weeks later I had heard from Mr. Killian, because he wanted to know if I might be

of some assistance to him in reviewing a number of proposals he had in regard to sound for the summer. At that time he was trying to sort out, you know, just exactly what the companies had sent.

Q. Can you describe specifically what Mr. Killian asked you to do for him?

A. Well, at that time he was trying to determine what the requirements would be, and so I proposed to him that I would try to evaluate the types of groups that he would have during the summer programming and would try to assess what the needs would be to come up with a list of specifications to be provided through any sound company that wished to bid on the proposal.

We also discussed providing a questionnaire so he could get better information to the particular group's needs. We talked about a number of details with the stage itself, stage flooring. You know, there was a number of ancillary items to the actual sound company.

From that conversation we then drew up a letter of agreement as to what services would be provided and on that basis I then gave him written documentation, I (342) solicited additional bids from sound companies that were from New Jersey, Connecticut, New York here, and, of course, Long Island.

Q. Hold up for a second. Were you at that time employed by the Department of Parks and Recreation?

A. No. I was only engaged by them as a consultant. I was never an employee.

Q. Were you or are you now an employee of either the Department of Parks and Recreation or the City of New York?

A. No, I am not.

Q. Did Mr. Killian indicate to you whether he considered that in his decision to use you?

A. Well, at the first conversation I think he thought I was a sound company looking to try and make an inroad into his office

for employment of my company, if I had such a company. He looked upon my independence as an asset, to be able to be a neutral person in the selection of whatever company.

One of the key considerations I think at the time had been that he was looking to produce the best possible season since it was his first season under his administration of the program. The idea was that he wanted to get the best possible sound company, you know, for the site.

(343) Q. Do I understand you correctly that as far as you were aware, he thought initially you might be pushing your own company and that was in fact not the case?

A. Yes. That was his initial impression, that I was just another one of the companies that might have been retained by the group that I had first been working with.

Q. And were you in fact affiliated with that group or any other sound provider, sound amplification provider?

A. No. I tend to—I mentioned before I tend to be an independent producer and work with other groups in producing their events. If the group has a good idea and needs to get it up on stage, as far as the technical details, whether it's the lighting, the audio, the stage itself, that's generally the areas that, you know, I address as far as client needs.

Q. You spoke earlier of a questionnaire. I take it that's a questionnaire that would go out to the sponsors of events?

A. It generally goes out to each group or performer to try and ascertain what the needs of that group or performer might be ahead of time. This information is then used in order to provide the electrical information for hookups, it is also forwarded to your sound contractor in order to provide the sound contractor with what the needs will. That gives everyone lead time in order to come up (344) to the given performance date with what you need to do the job.

Q. In advance of the performance?

A. Of course.

Q. Is the use of this questionnaire in your experience unique to the bandshell or have you used it in other contexts?

A. Well, I have developed a number of questionnaires over the years, generally more site specific. Most people have particular facilities that limit or enhance, you know, the ability of a group. For instance, how do you load in, where do you park? These are things that generally you put down on those forms in order to help the performers as well, in order to tell the performers additional information.

Most of what you're looking for is the information back from the performer. If the performer provides you with the number of performers, the technicians they can provide, the number of microphones that they might need, special equipment requests, all these are part of the answers that you're looking for an such a questionnaire.

Q. Forgive me for asking the question, but would the purpose of this questionnaire be to harass the performers in any way?

A. No. It's almost an industry standard. You can (345) look at almost identical information on any form created by any particular performance hall.

Q. Returning now to the chronology of your work with Mr. Killian and for Mr. Killian, can you tell me what you did when he requested that you provide the requirements upon which the various sound amplification firms could bid?

A. Well, most of our work was in generating the information. Joe actually created the final form, and he used information and a sample form that I provided to him for that purpose.

At that time we discussed whether or not I would create an actual form for him that was very specific and do that, you know,

for the parks. But he felt at that time his office should be the final authority on that request form.

Q. Did there come a time when the request form resulted in proposals being made to the department, to your knowledge?

A. This is more for the performers. It's not so much for the sound company, as far as soliciting bids or information from the sound company. What was generated was a list of minimum requirements for soliciting bids, i.e., when we were in discussion with a given company we would give them a minimum list, so there is a standard by which all the companies would bid against.

(346) THE COURT: And by companies you're talking now about sound companies?

THE WITNESS: That is correct.

THE COURT: Who Mr. Killian was considering possibly as a sound contractor to service the bandshell, true?

THE WITNESS: That is correct.

THE COURT: Fine. Okay.

Q. Do you recall how many firms submitted proposals?

A. We had a review of approximately 16 firms. When I say we, let me clarify that. I have a colleague that works with me who has approximately 20 years experience in audio engineering and he provides very detailed information regarding to the theory and practice as far as what we would call the more esoteric aspects of the business.

Q. And you reviewed the bids, the proposals submitted by these 16 firms?

A. Yes, we did.

MR. PINES: I would like to have marked as Defendants' Exhibit C a two-page document.

Q. Did there come a time when you summarized the proposals in a tabular form?

A. Yes, we did. I produced for him a final document. We had tied to sort them out to come up with a list of companies that did satisfy the minimum requirements. (347) In a number of cases we found companies that would provide more and exceeded the requirements by quite a bit.

Q. I show you what has been marked Defendants' Exhibit C for identification and ask you if you can identify the document.

A. Yes. This is the document that we produced for Mr. Killian.

Q. Can you briefly summarize for us what is contained on this table?

A. Well, in reviewing most of the documents that came in, the bids, we found that some of them were written up in different forms. We found that some were in the form of a letter saying that they would, in a very friendly sort of way, provide wonderful sound for a given, you know, event. Some companies provided an inventory and on the inventory sometimes it said mikes provided. There was a lack of any real clear distinction or uniformity on a number of the initial bids. That was one of the problems that Mr. Killian had in trying to sort out what was being offered.

The reason that it came out in tabular form was trying to provide a comparison study of what these major companies here were offering at that time. We came up with essentially the standard format of the company name, then a listing of the equipment.

(348) The equipment listings are broken down into the input type devices, which are microphones and something known as a direct box, which allows instruments to be connected to the sound system. We also looked at the mixers and tried to evaluate mixers

side by side, amplifiers, speakers. We also noted some of the particular bits of information we had gathered in the process.

There was also at the time of the bids a proposed pricing that was offered as a contract. This was done on this sheet for our comparison to get an actual, you know, chance to say, well, this company is offering X amount of inventory and perhaps ability for a given price. This gave us some sort of feeling in the evaluation.

In trying to decide on the final listing we only proposed a recommendation to Mr. Killian at the time. As such, the final pricing, I really cannot be specific if this was what was determined, because that's a difficult area as far as this —what I mean by that, this is spread out over an entire season. This is not, you know, very specific. If I wanted something for Saturday night I would think this would not be the same pricing structure I would look at for a single weekend event.

Q. An actual per event cost might be higher?

A. Generally I would expect it to be, because most of the pricing that we discussed for most of the firms was (349) based upon a block contract of say 45 to 60 events.

Q. For example, in the last column on the right I notice there is a proposed event price per and then 45 and 60. Does that per price, to your knowledge, correspond to an actual per event price or is it a reflection of an assumption made of the seasonal price divided by a certain number of events?

THE COURT: If we are about to start considering the contents of this document, Mr. Pines, it must be in evidence.

MR. PINES: I am sorry. I would like to move this into evidence.

THE COURT: Is there objection to the offer?

MR. KINIGSTEIN: No.

THE COURT: I receive it. Exhibit C received.

(Defendants' Exhibit C for identification was received in evidence)

THE COURT: Before counsel takes you further into it, can you tell me approximately on what date you forwarded this document to Mr. Killian?

THE WITNESS: I have a cover letter that was sent with this, that was part of this document originally. My recollection at the time, the cover letter with this I think took place approximately April—

THE COURT: Would it refresh you recollection (350) to look at the covering letter?

THE WITNESS: I think I might have that in my file, yes.

THE COURT: I would be interested in that, I think. Why don't you see if you can refresh you recollection on the point.

(Pause)

THE COURT: Can you tell me now, Mr. Floyd, when that document, Exhibit C, was sent to Mr. Killian?

THE WITNESS: Yes. This was done April 28, 1986.

THE COURT: All right.

BY MR. PINES:

Q. Mr. Floyd, did Defendants' Exhibit C contain any indication of which firms if any you recommended to Mr. Killian?

A. Yes. We had at that time, from all the information, we had proposed that New York Sound be the one that he should contact and, you know, develop a contract with.

Q. How is that reflected on this document?

A. We clearly stated our first choice for recommendation was New York Sound.

Q. I am asking specifically on the document. Is it reflected anywhere on the document?

A. Yes, it is. There is a listing that says number (351) one choice.

Q. Are you referring to the fourth firm listed on page 1?

A. Yes, that would be the fourth listing on the document.

Q. Can you tell me on what basis you made that recommendation?

A. There was a number of considerations. First of all, there is the specified inventory to cover what we thought was a minimum condition for the site and whether or not it exceeded that.

THE COURT: By inventory you mean equipment?

THE WITNESS: Exactly.

THE COURT: All right.

A. There was also conversations with previous contractors of the services from the companies. We called a number of people who had worked with these firms and we got a number of recommendations. That was another factor.

We also talked with each of the companies in what I call looking for more than a sound company. I.e., we look for somebody who isn't there just to put up a microphone that's turned on and collect the check at the end of the day. We look for a company that's very involved, that provides a professional demeanor, a professional style in the performance situation, a company that provides a lot (352) of expertise and assistance to the performers to make them as professional as possible. In a number of instances of the types of programs that Central Park has produced this was of great benefit I think to some of the performers.

Q. Can you give me an example of that?

A. Well, for instance, one group that I am well acquainted with was a group called City Lore. It's their first year in business. They had close to 10 different types of performing acts on stage of all sorts of different music. Each group—some of them are folk musicians, who had never been on stage before. They had never used sound equipment.

The company provides a technician on stage to assist the performers in mike placement, location, in trying to get the best quality out of the equipment. This is something I always look for in any company because there are times on the job when you will not, you know, come up with what is actually specified in a contract situation. You will find a situation that the company has to give a little bit more, that you rely upon those people to be part of your overall team as far as if you are the producer.

Q. In your experience, New York Sound provided that equipment over and above the technical level?

A. Yes. In fact, we felt that their assistance—and this was partly due to some of the recommendations from (353) previous, you know, contractors of their services—we found that they looked to be an excellent company in that respect.

Q. Did you consider any other factors in your recommendation of New York Sound?

A. We considered a number of things about what they provided, their ability to provide a complete inventory for any event. What is listed on this document is essentially a minimum listing. They were able to provide in their proposal additional equipment in the sense that we could see 32-channel mixers, we could see almost anything that was needed. It was listed in their shop inventory provided at the time when they bid.

Q. Did you receive a document that contained their shop inventory?

A. Yes, we did. This is actually a small listing. They have more than what was listed. After we made phone contact with them we got an even more extensive list.

MR. PINES: I am now marking as Defendants' Exhibit D a one page document.

Q. I show you whats been marked for indentification as Defendants' Exhibit D. Is this the document you were referring to?

A. Yes, that is the document.

MR. PINES: Your Honor, I move this in evidence.

(354) THE COURT: Is there objection to the offer?

MR. KINIGSTEIN: Could I take a look at it?

THE COURT: Yes.

MR. KINIGSTEIN: No objection.

THE COURT: Proceed.

(Defendants' Exhibit D for identification was received in evidence)

BY MR. PINES:

Q. I notice there is handwriting on this document, Defendants' Exhibit D. Can you identify the handwriting?

A. Yes. That was some additional notes that were made at the time when we first called to try and get a more complete description of what these numbers represented.

Q. I am sorry. Can you identify the handwriting itself?

A. Oh. It is mine.

Q. And this is additional information you personally obtained from New York Sound?

A. Yes, it is.

Q. Does this provide a description of equipment over and above that that is contained on Defendants' Exhibit C?

A. Yes, it is.

Q. And did this play a part in your recommendation of New York Sound as the number one firm that you (355) recommended?

A. That was part of it. We did this with most of the companies because the original information submitted was not broken out in a clearly labeled form on many of the proposals submitted.

Q. So other firms also submitted additional information of this sort?

A. Yes.

Q. And based upon your consideration of all of this material, you recommended New York Sound as the number one choice?

A. Yes, we did.

Q. Do you know whether the Parks Department in fact retained the services of New York Sound at the bandshell for the summer and fall season of 1986?

A. To my knowledge, they did so. In fact, I think as—one of the things we recommended to Mr. Killian was that he try out this company on a trial basis and not engage in a one-term contract, that it should be a two-part activity at best. That way he would have a chance to see how well they worked over nine performances. If he felt that they were sufficient and satisfactory both in their competency technically and also in their personalities and working with performers, then he should go ahead and, you know, contract for the balance of the season.

(356) Q. Do you know whether Mr. Killian in fact did retain them for the balance of the season after the first nine performances?

A. Yes, he did.

Q. Did you have occasion to visit the bandshell during the 1986 season at the bandshell?

A. Yes, on a number of occasions. I visited it before the season opened. In fact, I have been to the bandshell over the last couple of years as far as viewing and listening to different events that have taken place there. During the '86 season I was there approximately 12 times.

Q. What was the purpose of your being on the site in 1986?

A. Well, the greatest reason was to, first of all, review the company that we had recommended to see if they were providing everything that was specified initially, and then whether or not they held up with it, because our sense of who we recommended, you know, whether or not we would continue to, say, recommend this company or if we would have, you know, different thoughts about how they finished out the end of the season, you know, if the company provides a lot up front at the first part of the season and then, you know, let's off towards the end, that's a consideration. There was also some groups that I had been (357) involved with in trying to assist them in their staging.

Q. So in some instances you in fact had an artistic interest on behalf of the groups you were helping stage?

A. Yes.

Q. Can you describe the first event you attended at the bandshell in 1986?

A. The first event that I attended was an event involving the policemen's auxiliary, and this was essentially I think his first formal opening performance. There was I believe the weekend before another program. But since that did not involve New York Sound, I was not there for that one, and as such my work had required me to be out of town, since it was not clearly one of our

obligations towards the group that we had recommended, I was not there for that weekend.

Q. What group performed on the that weekend?

A. I believe it was a group called Rock Against Racism.

Q. When you were on-site what exactly were your responsibilities, what exactly did you do?

A. Well, when I was on-site initially I provided an evaluation from our point of view as to the quality of the sound, sort of a tune-up kind of affect, saying that we should make certain changes in the placement of the speakers, that—myself and my colleague, we were involved (358) in taking a certain number of sound measurements. When I say a certain number, we go up and get sound measurements from the sound console all the way out to the perimeters of the areas, and this is approximately a 270-degree radius. We try to evaluate the frequency response and sound levels of the sound equipment on stage and how well it's working. This gives us some information as to the use of that particular setup by that given sound company. Another concern was how much sound was going over beyond the audience area into adjacent areas.

Q. Was part of your concern sound coverage in terms of evenness of sound?

A. That was a big part of it, because we were looking to see if the sound company had indeed provided enough equipment. If they needed additional speaker enclosures on stage, then that would have been asked for at that time. In that way we were providing advice to Mr. Killian, and he I think was relying upon our services to make that assessment.

Q. Let me try and understand this. You're saying that if, for example, you felt that the sound was insufficient and needed additional equipment you would make that recommendation to Mr. Killian, is that correct?

A. That's correct.

MR. KINIGSTEIN: Objection.

(359) THE COURT: It's a fair recapitulation of what the witness said, I think.

Q. Did you in fact make such a recommendation to Mr. Killian?

A. At the time we found that we did not see a need for additional equipment. The equipment provided by New York Sound was not even—it was running at approximately one-third of its given capacity.

We ran some sound tests with the sound company with some tapes we supplied to the sound company to provide, you know, some level test to see what the effects of volume versus distortion might be. That was sort of—typical of the things we did.

Q. Were you then satisfied that New York Sound's equipment was adequate to cover the bandshell area?

A. We found it to be more than adequate. In fact, in some aspects, for some of the performers that were on his schedule, we found that the equipment might have been more than what was needed and maybe less was necessary.

We did recommend that the speakers be placed up a bit higher on side scaffolding, which had been a point of discussion with the company. At that point we suggested to both New York Sound and Mr. Killian that the scaffolding be done. Mr. Killian and New York Sound worked out who would actually supply the scaffolding and who would build it. (360) They were looking for a permanent enclosure to be there all summer provided by the parks. I am not quite sure if Mr. Killian agreed to do that or if New York Sound actually completed the material cost aspect of that.

This was done because we felt we needed some more room on stage and it would also allow the speakers to be adjusted more

towards the audience area rather than straight out off the stage. So that the scaffolding would be built specifically for, you know, the requirements of the speakers.

Q. Did you have occasion to speak with any performers or anyone on-site with respect to the adequacy of the services provided by New York Sound?

MR. KINIGSTEIN: Objection. When are we talking about, the whole season?

THE COURT: Sharpen the focus.

MR. PINES: I will be happy to. If I might, I would like to ask the question generally. If the witness can respond with specifics, I will then direct his attention to that specifically, if that's permissible? Is it permissible? If not, I will rephrase it.

THE COURT: Rephrase it.

MR. PINES: Fine.

Q. Did you ever have occasion to speak to any performers on-site in 1986 at the bandshell with respect to (361) the services provided by New York Sound?

A. On several occasions I did so.

Q. What was your purpose in doing that?

A. The purpose was to provide some feedback as to how well the sound company was doing in providing services to some of the groups. Without specific dates or performing groups, on several occasions we did not identify ourselves as either being with the sound company or with the parks but sort of in a general way said "Would you hire this company? We're thinking of doing an event. Would you recommend that we do so?" We found that the reaction was generally positive. I know—

MR. KINIGSTEIN: Objection, your Honor.

THE COURT: On what basis?

MR. KINIGSTEIN: Generally, I think it's hearsay.

THE COURT: No. In essence, the witness was asking the performers how did they feel about this, and the response would be admissible under 803(3). I also accept it as the foundation for what this witness may then have done or recommended himself. But it is not hearsay, in any event. The inquiry may continue.

A. It was also my understanding from Mr. Killian that the sound company was contracted for services on other occasions outside of the bandshell by performers who had found that the services had been, you know, to their (362) satisfaction at the bandshell.

Q. Did you receive any indication from any performers at any time in 1986 that the services provided by New York Sound were in any way less than adequate?

A. No, I did not. And we were kind of concerned about that because we felt that this was, you know, Mr. Killian's first, you know, event, or seasonal event, and if we had made a recommendation that he was unhappy with then it would reflect on what we had recommended to him.

Q. Did any of the events for which you were present at the bandshell involve electrified instruments?

A. Yes. Actually, we had the full range of things. The events that I viewed, you know, and listened to ran the range of folk musicians with different varieties of ethnic music all the way up to things that I would call rhythm and blues, rock and roll, reggae, which included things such as electrified pianos, guitars, bass amps, full drum sets, some of the other, you know, various things, you know, as far as musical instruments go. But I would say we saw almost everything that was normally used by a group that's electrified.

Q. And did you feel in your opinion that the amplification provided for the louder events was adequate?

A. Yes. I think there was no real question about adequacy. I think there was a question of an esthetic (363) balancing of too much sound versus, you know, leaving it at a certain level. I think the sound company showed remarkable sensitivity to that problem.

Q. To your knowledge, did the musicians at these latter events ever indicate any displeasure with the esthetic mix, as you described it?

A. No. I think that was because they received everything that they needed in a monitoring mix on the stage. They were able to get the sound that they wanted to perform as a performer on stage.

There is a real difference between the sound on stage and the sound in the audience. You know, the speakers tend to put the sound out in one direction for whatever the designed criteria are for that particular speaker unit. The monitor situation generally is the more interesting and sometimes more difficult aspect for sound for performers you're not accustomed to working with. I think they managed to provide satisfaction for almost everyone I knew of.

Q. And during these latter events were you personally aware of any complaints from anyone in the audience that the mix was inadequate in any way?

A. I don't have any information that anyone was displeased in that regard.

THE COURT: Forgive me a minute, Mr. Pines.

(364) Following up on what you have just said, it sounds to me—correct me if I am wrong—that as far as sound mix is concerned you are drawing a distinction between what the performers hear vis-a-vis themselves on the stage during the performance—

THE WITNESS: Yes, that is true.

THE COURT: —and the sound mix which is projected out to the audience and is heard.

THE WITNESS: That is true.

THE COURT: Is it your view that both of these factors are important?

THE WITNESS: Well, very much so. If I as a guitar player have some particular need to address my artistic output as a guitar player and I need a better perception of what that is in the overall, you know, combination of say four guitar players, and I want some emphasis placed on what I am performing so I know what that is, or the converse can be true, if I want to hear my three colleagues playing more so than I want to hear myself playing, and that's in order so I can maintain proper rhythm or—you know, whatever, as a group performing together, you know, that entity, I would then be able to get that in a monitor mix. That mix in many cases is different than the mix that is provided in the audience.

THE COURT: Let me ask you if this is the same (365) point. The impression I get from reading reviews of the revised and rebuilt Carnegie Hall is that from the audience's point of view the acoustics sound pretty good, but I understand from reading in the paper that there is quite a level of criticism among the members of the orchestra themselves in respect of the acoustics as between the various members of the orchestra. Is that essentially what we are talking about?

THE WITNESS: I think that's a slightly different situation, but it has some performer-audience similarities.

THE COURT: I suppose what I have just talked about is the acoustics of the hall itself whereas you have been talking about

technical amplification and sound mixing. Have I come up with a less than helpful analogy?

THE WITNESS: I would say from my experience—let me see if I can correlate that. Some of my background has been with outdoor environments and also indoor environments. The indoor environments, most recently I have worked with the State University at Stony Brook and they have an indoor hall that has a steel shell. That's a natural acoustic device. The shell allows the performers on stage—this is classical as well as symphonic type works as well as soloists—to hear the other side of the orchestra. They can hear that very pronounced. In fact, (366) the conductor will set up his staging of what performers, you know—say the violin section, the woodwinds, so on, according to how he thinks the hall might work, and on stage it's much different than what you hear out in say the tenth row.

So the performers are accustomed to hearing themselves or say the other members in a particular way with particular accentuations. So when they changed the acoustics say in Carnegie Hall the performers who have performed there say for 20 years had developed a technique for what that was. By doing that, by changing the hall, the performers now have something different to adjust to.

Now, the audience may find that the sound to the audience has never changed. Now, some people seem to have their opinion about that. That part of it may be very similar to what were talking about, say the monitor situation on stage for a performer, say whether he's in an indoor hall with amplified instruments, a system that provides reinforcement rather than a natural sound versus what they are providing the audience.

The situation on most stages is that the monitors can be set up so you feed all the microphone inputs into the given monitor, so we can set that up any way we want to do that. The performer will consult with the sound company before his performance and say "I would (367) really like to get more of the piano mixed into

what I am listening to." He can specify that. And almost every sound company in the business, if they are on the job, will consult with the performers ahead of time as to what these requirements may be.

You can go so far as having an extra mixing technician on stage with another mixing console to provide an active mix song by song. These are, you know, features that you would look for in a sound company, their ability to provide this capability. In general, most of the people will play a set and they will set it up—a set being a collection of songs say—and then they will make adjustments. There is a certain amount of tune-up and a sound check that's required for the sound company to—it's just like the violinist—to fine tune his instrument.

So these are all parts of that. Here again, the performers on stage very rarely can tell exactly what the sound is out in the audience area and that's left up to, you know, someone either like a producer or someone from the group that may have a sense of that, where he can lean over to the sound technician and say "We really are accustomed to this group having more of this," and the sound technician, with the myriad of knobs and dials on the control panel, can make a very quick adjustment and bring up exactly what's required.

(368) This is similar if you go into a recording studio, where the performer has a headset on, and he gets exactly what he needs, and with the headset he may not get the 24 other tracks of, you know, other singers, he may get himself and just the piano, but when they do the mix in the booth, then they can mix in everything together and he becomes part of the collective whole. That's something that's more of maybe packaged sound versus say live outdoor sound which you're doing on the spot. It's a little more interesting. It's really by most accounts a different field. Most people will set themselves up doing one or the other.

THE COURT: Okay, fine. Thank you.

Forgive that intrusion, Mr. Pines.

MR. PINES: Fine, your Honor.

Q. If I could ask you, you referred to the advantages of some advance notice with the performer. Is that a fair statement, there is an advantage to this kind of advance notice?

A. Yes. I think it's two-fold. It helps the performer by making sure that he has had contact with the sound company to try to get his particular needs addressed. If he has a special item, then he has, you know, the opportunity to make use of that the day that he shows up.

It's unreasonable to ask, especially in New York (369) City I think on say a Saturday morning, to try and track down in this town a given piece of gear on that day. Now, most sound companies will try to have in their inventory a large collection of the most commonly used items of the highest quality so that they are covered if they never made contact with the given group. That way you have a certain number of things that, you know, you would provide automatically. But if there was something special, a special type of delay unit that was an obscure type unit—this happened to us last fall, where I worked with a gentleman named Carlos Nakai, a Native American Indian who does electronic sound as well as natural sound, does a lot of film work. I was in the situation with the sound company that we needed to provide a special delay reverberation type unit. It is not a common unit. We talked to him a week ahead of time and had that information and within several days were able to obtain that item. We had to rent that at our expense as the producers.

Q. Are you speaking of the Naumburg Bandshell?

A. No, no, no. This is a separate item. What I am trying to describe is something that is more typical of the trade practices.

Q. I understand. But this was not a Naumburg Bandshell event?

A. No.

(370) Q. Do you know whether at the Naumburg Bandshell there was any mechanism by which New York Sound was able to obtain advance information in helping to plan events at the bandshell in 1986?

A. Yes. As far as the—this was a situation that I had discussed with Mr. Killian to try and make this the best possible arrangement, his questionnaire as a starting point that he would send out several months in advance to the groups.

Q. Let me stop you for a moment. I direct hour attention to Joint Exhibit 1, page A 95. Can you identify the document?

A. Yes. This is a document similar to what I had proposed to Mr. Killian. I would also like to mention the next page, A 96 here, is the second page of the same document. This is all the information.

Q. I direct your attention to pages A 109 and A 110. Is there anything on these pages that is the kind of information that you're talking about in terms of assisting New York Sound in advance of the event?

A. This is the first time I have seen this particular document.

THE COURT: Take your time.

Q. Let me just direct your attention, to save time, to A 110, the section headed Electrical Energy. Is any of (371) that information of any assistance?

A. I would find that this would be less than adequate. It specifies the electrical need, but beyond that the description of electrical amplification I find is not as helpful as I would want it to be. It is less than useful information.

Q. So would you then need the information provided on A 95 and A 96?

A. To be perfectly honest, I would want them both.

THE COURT: But what we are talking about now, Mr. Floyd, is information which would then fully advise the New York Sound Company with respect to what they should have available or provide in order to guarantee the quality of the performance. Am I right in that?

THE WITNESS: That is correct.

A. Following up from what you asked before, the second part of it beyond the questionnaire, things can change from the time the questionnaire is sent in to the time of performance.

The sound company had the habit of calling performers ahead of time. They would obtain from Mr. Killian the number and contact person with the group to try and arrange, you know, information as to what the specific needs might be. This is to their benefit because if the company only requires say two microphones versus twenty (372) microphones the company would not provide a full inventory on-site unless it was needed. They would be able to save some manpower at the shop. And so it was to the company's benefit to make this determination.

Q. Were there any circumstances under which it would be to the performer's benefit?

A. Yes. Almost every group that I have worked with, we try to provide a sense of stage management from the group as to what their setup might be, what their electrical requirements might be as far as power required in addition to what is already there. If there is a problem, then you can work on it ahead of time.

Q. You spoke about an incident that didn't occur at the bandshell in which a sound firm that you had some dealings with was able to provide some relatively esoteric equipment. Do you know whether there were ever any such instances in your knowledge in which New York Sound performed a similar service for performers at the bandshell?

A. Not to my knowledge. As far as I know, they met all the needs.

Q. Can you identify for me the loudest performance, the group that provided the loudest—

MR. FOSBINDER: Objection to the word loudest. There has been no evidence that loudest is scientifically determinable in any way and that's the clear thrust of this (373) whole argument. What does he mean by loudest? Is he referring to a scientific measurement or a subjective measurement?

THE COURT: I would be obliged if you stand when you address me, if you have an objection.

MR. FOSBINDER: I am puzzled by the use of the word loudest. I think it's too vague. What does loudest mean? Is he referring to it in a scientific manner as an expert witness or is he referring to it in a perceived manner—

THE COURT: I think you better rethink the question, Mr. Pines. I think the objection is well-taken.

Q. With respect to the performance that involved electric instruments—I am speaking now about the event that you referred to that had electric guitars, electric piano, drum sets and other instruments—were you speaking at that time about a specific performer?

A. Yes, I was.

Q. What music was that, what kind of music was that, if you can qualify it?

A. Well, I am not sure that I would be the musicologist here, but I would describe it as rock and roll reggae, maybe. The sense of determination of that group is what I mentioned earlier. In making the sound checks we did use a standard meter that measures in the standard (374) units of sound, known as a decibel. We looked at sound on an A scale and a C scale as far as what the

ratings refer to. In this sense there was measurements of sound, as I mentioned before, at the sound console and at the perimeter of the audience area and at the back of the site of where the bandshell is to see, you know, what the falloff of sound might be.

This was partly, you know, the reason why we changed some of the speaker, you know, location, was to provide a better sense of coverage and more enclosed area of sound rather than trying to send sound out beyond the particular audience area.

Q. How did you attempt to accomplish that?

A. What, the sound measurement or—

Q. The containment of sound.

A. Well, this is a particularly difficult thing to do in that area because you're dealing with an outdoor site. What we did do was try to redirect the speakers so that their coverage was more directed towards the audience area directly. This was done by raising the back of the speaker columns so that the sound was focused more towards, you know, the audience area.

Q. The columns were angled down? Is that fair to say?

A. Yes. As I say, we did do the measurements and (375) we found that this helped, but it's not a total solution. The thing that you have to go by is maybe at what point is the sound, you know, fallen off a bit to where you can do other events or other activities perhaps. This gets to be—you know, you interfere with some other activity.

There were different levels for different types of sounds. We found on the average of the number of times that I was there on-site we were looking at approximately 80 decibels to 85 decibels out at the sound console.

Q. Which is where in relation—

A. That's approximately 60 feet from the stage.

THE COURT: Hold on just a minute, please.

(Pause)

THE COURT: Thank you. Go ahead.

Q. Did you have occasion to travel into the audience during this concert, the reggae rock and roll concert?

A. Yes, we actually were in the audience. One of the measurements that we take is the sound at the speaker itself, within three feet—generally about one meter is the specific distance that most specs use—to see what the output was and what the axial response had been. That was, you know, just to satisfy some of our own curiosity.

Q. Axial response being the dispersion of sound with respect to a straight line pointing out from the (376) speaker?

A. Right, exactly. We took measurements out at the back. One of the reasons this was done, one of the particular groups I worked with had proposed to Mr. Killian that they would like to run additional craft and instrument makers and demonstrators of folk music traditions at the back of the audience. So we were looking to find the areas that might serve best, you know, for those purposes.

That particular group, City Lore, found that they put out eight additional exhibitors in the same area, at the back of what I would call the audience area, without having any problems there, and the people at the back of the audience I think found that the sound still was sufficient for whether they wanted to stand or listen or get up and dance.

THE COURT: You spoke of taking a reading three feet from the speaker. There is more than one speaker in this setup, isn't there?

THE WITNESS: Yes, there is. How much amplification do you want?

THE COURT: That satisfies me. I just wanted to make sure this wasn't a one-speaker operation. I didn't think it was.

THE WITNESS: No.

Q. Perhaps you can say how many speakers are (377) available to New York Sound. What was the largest number of speakers—well, that's two questions. How many speakers to your knowledge are available from New York Sound for Naumburg Bandshell performances?

A. Well, we can count the boxes or we can count the number of speakers in a box. We can do it several ways. I am not sure that—as far as the number of units out there that cover it, I would say there was approximately eight offered. I think as far as the type of unit that they use, the particular model of speaker cabinet with all of its innards, there was on the average eight units used for each event, on the average. Some events, you know, you needed more or you needed less.

Q. And how many speakers per enclosure, per box?

A. Well, in their particular instance—

THE COURT: I don't think I need to know that. You're talking about things like woofers and tweeters inside boxes, is that right?

THE WITNESS: Exactly.

THE COURT: I don't need to know that.

Q. In any case, I take it your testimony is the sound levels were adequate for all purposes during the 1986 season at the bandshell?

A. We found that we could—

MR. FOSBINDER: Objection. I don't mind the (378) leading so much, frankly, but I mind the term "adequate for all purposes."

THE COURT: Yes. I think you better cast it in terms of knowledge of complaints or to the extent—I don't know, Mr. Fosbinder. To the extent that the witness himself was there at concerts—

MR. PINES: Your Honor, I can clarify it, because the witness has testified about how he measured adequacy of coverage.

THE COURT: All right.

Q. As far as you actually measured in terms of sound coverage for an audience, I take it then that New York Sound's sound coverage of audiences for the events at which you were personally present was adequate as you measured sound coverage?

A. Yes, we found it to be quite sufficient. Some of the things I have been involved in—this is more for indoor halls—is that we do take readings because you find that there are dead spots in a given hall. I would not say that I am the electrical engineer who designed some of the more high order systems that are out today, where they use computer analysis, I cannot make that sort of claim, which—you know, I won't go any further with that—but we take, you know, samplings around the site and part of that, you know, as I mentioned, one of the reasons we (379) got into that was to look at what else could be done in the area, hence the speakers being like light beams, sort of broad ones at that, whether or not we would have for instance say groups on the side that we would need additional reinforcement for groups, you know, off to a given side. We found that we didn't—everything was satisfactory.

Q. In your opinion, is New York Sound's equipment adequate to produce sound for a rock and roll event involving guitars, drums, electric keyboards and vocalists?

A. We found that there should be no reason why they could not do such an event. Some of the people that we talked to had used their services in coliseums seating 4000 people or more for that purpose and I would say that if you wanted to raise the vol-

ume level to the threshold of pain for the first ten rows I think they could probably satisfy the need.

Q. Do you know whether consultants from the sponsoring groups were able to interact with New York Sound during performance?

A. Yes. I mean, you're speaking of the performers trying to make changes?

Q. That's right.

A. Yes.

Q. That was done?

(380) A. On the events that I was there and noticed, there was, you know, a lot of interaction. They generally provided one man on stage and one man at the mix console.

Q. To your knowledge, was that person involved in the actual mix that was obtained?

A. Yes.

Q. Are you yourself affiliated in any way financially or otherwise with New York Sound?

A. No.

Q. Are you familiar with the concept of temperature gradients?

A. Yes, I am familiar with the term and with the implications of what some people make of it. In my experience, especially at the Smithsonian, when we did outdoor events starting from early in the morning til' late in the evening, we generally found in the outdoor situation most of our people probably neglected it, you know, it was not a factor that was a major consideration for our people. They found that a greater thing was perhaps the fatigue of the performers and the fatigue of the technicians if you're working a long day.

MR. PINES: I would like to have marked as Defendants' Exhibit E, I believe, two pages of documents, and for the record I would like plaintiff's counsel to stipulate that the two pages, one of which is handwritten (381) and one of which is printed, are equivalent to the best of our ability to decipher the legibility of some of the writing. For example, I notice that one of the entries is partially illegible and is noted on the document as such. But with that provision, will plaintiff's counsel stipulate to that fact ?

MR. KINIGSTEIN: Yes.

MR. PINES: Further, I would ask plaintiff's counsel to stipulate that the handwritten document was provided to defendants by plaintiff's counsel as a listing of equipment that I believe Alan Thompson owned. Is that correct ?

MR. KINIGSTEIN: Used by Alan Thompson for the Rock Against Racism concert.

MR. PINES: All right.

Q. I show you what has been marked—

MR. PINES: Can we stipulate to its admissibility? This witness will not be able to offer—

MR. KINIGSTEIN: Yes.

THE COURT: All right. I will receive it. Just to make sure I understand what it is that I am receiving, it is a list of sound equipment as best as we can decipher it actually used by Mr. Thompson in producing a Rock Against Racism concert. Is that true?

MR. KINIGSTEIN: True.

(382) THE COURT: Do we know what year?

MR. PINES: 1986.

MR. FOSBINDER: If I may, this is just a list of the sound equipment per se. There were other instruments and devices.

There are some things sort of on the boundary of sound amplification and interfacing between the instruments. I am not sure. Some of that may be missing.

THE COURT: What I now have by stipulation is a listing of the sound equipment that Mr. Thompson used—

MR. FOSBINDER: Understood to be the sound system per se on that event.

THE COURT: Sound system per se, RAR 1986, correct?

MR. FOSBINDER: Correct.

THE COURT: So stipulated, exhibit received.

(Defendants' Exhibit E for identification was received in evidence)

BY MR. PINES:

Q. Mr. Floyd, have you had occasion to review this document before taking the stand this afternoon?

A. Yes, just this afternoon.

Q. Prior to taking the stand?

A. Right.

Q. Have you had an opportunity to compare this array of equipment with the array of equipment that was (383) provided to the Department of Parks and Recreation by New York Sound?

A. I find it essentially—

Q. Let me first ask you, did you have occasion to do that, make that comparison?

A. Yes, I have.

Q. Were you able to come to any conclusion about let's say the relative depth and scope of this equipment?

A. I find it essentially equivalent. In some instances I might rate New York Sound Company's say amplifiers a bit better than what is shown on this.

THE COURT: You say that with respect to the amplifiers?

THE WITNESS: Yes.

A. I think this may be—here again, this is my considered opinion. I think you will find that everyone has a favorite. I do not find that the particular item specified here is in any way bad or in any way inadequate. Let me make clear this is a perfectly adequate list.

I also find in comparing it with the list provided by New York Sound that they are very similar in listing and capabilities, though the other one, I personally would give a slight edge to that particular item.

Q. Am I correct that your understanding is that the list of equipment provided by New York Sound is not an (384) exclusive list in terms of the equipment available from New York Sound if needed?

A. No, I know from their bid list, for instance, that they would supply a 32-channel mixer and sufficient microphones for 32, you know, microphone inputs.

Q. So it's fair then to say that New York Sound's equipment exceeds that that was listed on the document that you have identified today?

A. As presented on these two pieces of paper, yes.

Q. Perhaps I would ask you to clarify, if you might, because we have been speaking about two apparently independent sound mixers, that being the sound that's disseminated to the performers through the monitors and the sound that's disseminated to the audience through the speaker arrays facing the audience. Are all of the artistic adjustments that you have discussed at the mixing board available for both the audience mix and the performer mix?

A. In answer to the question, yes, but this could be a variable. You could have these mixes made either on stage or at the mixing console, depending on the particular needs of the performers.

Q. And the performers have esthetic input into both types of mixes, is that correct, at the Naumburg Bandshell?

A. Yes, that's correct.

(385) MR. PINES: No further questions.

THE COURT: The wind is rising and the hour grows late. There is some considerable cross-examination of this witness, is there?

MR. KINIGSTEIN: I would think, yes, your Honor.

THE COURT: Mr. Floyd—

MR. PINES: Your Honor, if I might. I know that Mr. Floyd, if possible, will make himself available, but he is not a New York City resident. He has traveled in from Long Island, I believe. Unless it's unreasonable to ask, I would request that we continue with the cross.

THE COURT: I can give you a few more moments, say until 10 minutes of 5. But if there is no realistic notion—

MR. FOSBINDER: I think that will do it.

THE COURT: You think so?

MR. KINIGSTEIN: Yes.

THE COURT: All right, fine. I certainly don't mean to foreclose or pressure anyone.

MR. FOSBINDER: Can I ask that we figure out our schedule with the other city witnesses? I had a plane reservation for tonight.

THE COURT: Off the record of scheduling purposes.

(Discussion off the record)

(386) THE COURT: Cross-examination of this witness.

CROSS-EXAMINATION

BY MR. KINIGSTEIN:

Q. You mentioned on your direct testimony, Mr. Floyd, that you met with Joe Killian in January of 1986, is that correct?

A. Yes, I did.

Q. Then you also mentioned that the letter recommending the different sound systems was written in April, is that correct?

A. That is correct.

Q. April of 1986. Do you know when New York Sound was then hired by the city?

A. No, I do not. I don't have the contract information. We just made the recommendation.

Q. You just spent on your direct testimony some time discussing the technical aspects of the New York Sound system, but isn't it true that the single most important factor in the reproduction of amplified sound, of this type of amplified sound, is really the person who is working on what is called the soundboard, or the engineer?

A. Not necessarily.

Q. Please explain your answer then.

A. Okay. I think you are correct in your statement in that if I would draw the analogy, an excellent (387) photographer could produce excellent pictures with any camera, including say a Brownie, a pinhole camera, whatnot. Those are going to be limited to the technology. As the technology gets increasingly sophisticated and complex with a given sound system you may find that the gentleman at the mixing console needs to know the particular equipment.

It is not uncommon—and I have seen it done—that one group may use another sound company's equipment and have their mix man or mixer sit at the console and actually do the mix. I have also seen it done that someone from the other group would sit with the fellow who knows the particular equipment and would specify that "I need this particular type of thing done."

Q. Very good. Let's speak specifically about the sound systems, what's been marked as I guess Defendants' Exhibit 4, Alan Thompson's list of equipment.

THE CLERK: Exhibit E.

THE COURT: Exhibit E.

Q. I'm sorry. Exhibit E and Defendants' Exhibit C. Between these two systems, which you stated were comparable, isn't that correct—

A. Yes, that is correct.

Q. —isn't it true that the single most important factor in two comparable sets of equipment like these is the person who is working the soundboard?

(388) A. No, I expect that knowledge and experience will transfer across a given type of equipment. Okay? I can step into a recording studio and be able to identify the equipment and what the controls should be doing and I have never seen that piece of equipment before.

Q. That's not what I am asking. What I am asking is that you can have two comparable systems, like we have here, that you have stated we have here, but that we haven't discussed or you haven't discussed yet the issue of the person who is in control of that system as having a definitive influence. I am asking you, isn't it actually a definitive influence in the way that sound is reproduced from the artist to the audience?

MR. PINES: Your Honor, I have to object. I have no objection to the leading nature, obviously, but I think that the form of the question makes it impossible to understand.

THE COURT: Well, I am more interested in whether the witness understood the question. Did you, sir?

THE WITNESS: I think so.

A. I will try and answer you to your satisfaction. I place high reliance on the technician at the console in knowing what the equipment should do. I would say that I have been able to change or influence the overall quality of the sound by giving specific directions to the person at (389) the mixer. Okay? So what you're presenting, that person controls the sound, if no one says anything to him, yes.

You have left the decisions and esthetic choices up to that individual. If no one has said "This is the kind of sound we want"—usually that person gets that information within the sound check at the beginning of the performance. The performers are generally very, very instructive about what they like and dislike; "Now, I don't have enough of this. Give me more monitor gain on this." If the operator is experienced and competent, then he gets it very quickly.

I have seen it done within two measures of music that someone can bring the sound right out, where you thought it was good it is now great. I haven't seen many operators who have that talent. I don't usually expect to find that with most operators. I think that a lot of people, you find that there are people who design systems, people who set up the systems, and they can go home. Then they leave a guy to run the mixing console.

Q. So your answer is no? I take it your answer is no?

A. I don't know that it's a complete yes or no question.

Q. All right. Then let me ask you this.

A. Excuse me. If you gave me a particular (390) individual on a given console and who could run the best job on that—but I have to go back to saying that I can still make that influence as, you know, a given individual from the group in giving instructions, because the gentleman is an operator, you tell him where you want to go.

Q. Isn't it true that an individual operator at a mixing board who spent much time working with a band will have a better understanding of how that particular band would want their music to sound?

A. Yes. I would say that most operators, if they have spent, you know, say a 30-day tour with a given group, would know something about that individual group's requirements. You know, there is no question there. I don't see that there is any difference.

I also would say that most people who have any experience know the trade, have worked for years in it, and can apply that same knowledge within an instant with any group.

Q. Within an instant, is that what you said?

A. Well, let me give it a little bit more than an instant. But an instant on stage is generally five minutes. Let's say relatively speaking, you know.

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(399) Q. Are you familiar with the term the dynamic range?

A. Sure.

Q. Do you know how much dynamic range there was at the concert that you were at?

A. Well, at—

MR. PINES: Your Honor, I object. Foundation.

THE COURT: I will let him answer.

A. You're looking at—with our equipment we generally measure 20 cycles to 20,000. Okay? Some of the equipment will actually do better. You know, here again you need to get into some of the better test equipment; i.e., my colleague is now, you know, involved with some stuff that he is measuring down to 1 or 2 cycles all the way up to approximately 30 to 40,000 cycles. These are not the kind of specifications we look at in the outdoor situation. The normal practice is to think of 20 to 20, as it's described.

Q. 20—

A. To 20. That means 20 cycles to 20,000 cycles.

Q. As the range for an outdoor concert? I am confused.

A. I'm sorry. I am confusing you with maybe (400) frequency response versus dynamic range.

Q. Right.

A. Dynamic range is actually—we talk about a system, for instance, the compact disk players today have greater dynamic range than your cassette units. That means we can put a greater amount of amplitude on the same signal.

Of course, some of the signals—when I was speaking of 20 to 20, we measure sound energy at different levels at different frequencies because it requires more energy to produce say a bass note versus say a high frequency note. The cabinets are larger, so you need a bigger amount of energy to drive, you know, 18 inches of a sub woofer, say, versus say high frequency tweeters.

Q. I am asking you specifically what the dynamic range was at the concert that you were at at the bandshell.

A. Okay. We looked at things that dropped down to approximately 60 and the loudest we got to I would say was approximately about 100, 105.

Q. Would you say there is a 40-decibel dynamic range? Would that be an accurate statement?

A. I would actually look at—as far as the performers themselves, they provide approximately 40 to 60 dB of dynamic range.

Q. Would you call that a normal dynamic range for an outdoor concert?

(401) A. Depends on the type of performers. I would say yes.

Q. Like in a rock and roll concert, would it be more?

A. It's really—where do you want to draw the line and start marking? Do you want to draw it at 40 decibels and go up to 100 or do you want to draw it at 40 and go up to 80 or are we talking about a group that starts at 80 at their quietest and goes up to threshold of pain?

Q. Let's say that the ambient noise was at say 60.

A. That's a fair—

Q. Okay. Tell me in your opinion what the normal dynamic range would be then for a rock and roll concert at the bandshell.

A. Okay. We would generally look at close to 80.

Q. You're starting at 60 and you would go up to 80?

A. Yes, if you're talking about rock and roll. Doing rock and roll at the bandshell, I would expect to see that kind of difference.

Q. Is that including peaks as well?

A. Instantaneous peaks, you could probably go even higher.

Q. You could go higher?

A. Depends on the sensitivity of your measuring device. Here again, peak versus average.

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(408) Q. You indicated in your testimony on cross-examination that there are some technicians who would be capable of making certain kinds of adjustments to perform sight unseen within a relatively short period of time. You say that would be five to ten minutes, is that correct?

A. Well, I would say, as I mentioned also, I know one individual who I have actually observed him be able to track within a few bars of music to make adjustments of a group that he has never seen. I think he is a rarity, but there are people out there with that kind of talent. But I would say that most people in trying to adjust all the things on stage and everything at the console generally it's a few minutes. You know, I mentioned five.

Q. Would you say that New York Sound is one of the outfits that can provide that kind of service in that period of time, five minutes?

A. I would say so.

Q. Let me ask, do you know whether any sponsors used New York Sound outside of the bandshell events?

(409) A. Well, Mr. Killian had mentioned that several of the groups had found their services to be more than satisfactory, to the extent that they had used them for other events, you know, outside of the bandshell.

Q. Based upon your total experience with New York Sound at the bandshell during the events that you witnessed, could you give us your professional opinion as to the overall quality of sound provided by them from the performer's point of view?

A. I think they are representative of the highest standards of quality of work that you could expect to find. I think, you know, you could find a number of companies to provide that, but I think they are typical of, you know, some of the better companies that are in the trade.

Q. Thank you. No further questions.

BY THE COURT:

Q. To follow up on that for a moment, you have said something of the equipment. Is it fair to say, Mr. Floyd, that during the 1986 season in the bandshell you attended a number of events for the purpose of monitoring the performance of New York Sound? Is that correct?

A. That is correct.

Q. And in the course of that activity on your part did you form an opinion as to the professional competence of the New York Sound Company's technician or technicians, (410) the sound mixers?

A. I think in general they were always agreeable, very helpful, considerate of the performers. In fact, I think they supplemented the stage management staff that was there. It was like having two extra, you know, staff members for the overall staff provided by the parks service.

Q. You make them sound like pleasant fellows. Did you form any opinion as to their technical proficiency or competence?

A. Yes. I think they are very competent. I would not hesitate to use them again if, you know, the need were to be.

THE COURT: All right.

MR. PINES: Your Honor, I have one quick question.

THE COURT: Yes.

REDIRECT EXAMINATION

BY MR. PINES:

Q. In any event, did you see Mr. Killian or anyone from the Parks Department intervene in any esthetic judgments or requests that were being made by performers?

A. No, I can't say that I ever did. I think he had quite a number of other problems and I think he was totally comfortable with the sound company after the initial conversations, you know, as to platforms and different (411) needs by each group.

Q. Again, in 1986 did you see any representative of the city that you knew to be a representative of the city, police or anyone from the Parks Department, again, intercede in any esthetic request made by performers to New York Sound?

A. No.

Q. Thank you.

THE COURT: That was entirely beyond the scope of the cross, so I will permit counsel an opportunity to pursue it further.

RECROSS-EXAMINATION

BY MR. KINIGSTEIN:

Q. Did you ever take any measurements at the property line at Central Park West?

A. You're referring to the top of our map here?

Q. Right, I am.

A. No. All the way across the park, say at the arch or the Women's Gate, no.

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Transcript of Proceedings on March 23-25, 27, 30, 31 and April 1, 1987
Testimony of Joseph Killian, Witness on Behalf of Plaintiff

(436) JOSEPH KILLIAN,

called as a witness by the defendants, having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. FOSBINDER:

Q. If you would, Mr. Killian, would you please describe your job duties as you understand them?

A. Yes. I work for the City of New York, Department of Parks and Recreation. I am the program director-manager for the Central Park Bandshell, Mall and Bethesda Terrace area.

(437) Q. What powers do you have relative to that job?

A. I manage events that go on there, I conduct on-site—I along with a group of other people conduct negotiations with various groups wishing to use the facility. In addition to that, I plan, promote and book a series of concerts at the bandshell called Summer Stage, I help groups use the facility in terms of obtaining sound permits or any other permits they may need, inform them of park policies, and generally serve as a liaison between the Parks Department and the public sponsor or the private performing group.

Q. Would it be fair to say that you understand the permit application process for the Naumburg Bandshell?

A. Yes.

Q. Could you explain it to me?

A. The permit procedure is usually someone will obtain a special events permit application, they will fill in the information,

mail it to me. Subsequently I will mail them our use guidelines along with a supplementary application we have specific to the bandshell. I will also mail them a technical requirements form. They will send those back to me and at that point we continue with the processing of the forms.

Q. Can you tell me how long this process takes?

A. Well, it depends basically on what their (438) response time is, what that turnaround time is. I mean, that time could take, you know, a day to that point. To point of approval it can be longer, however.

Q. Could you give me an idea of what you perceive to be the average length of time between your receiving all of the applications necessary and the actual issuance of a permit?

A. Average time is a minimum of two to three weeks and I would say it can take as long as eight to ten weeks, because what happens in the procedure is after we receive these applications they are disseminated throughout the department to various people who have input in Central Park. We have operations meetings where we bring the event up—

Q. Let's go back to the whole procedure in a minute. Could you tell me whether or not it's true that some applications have been granted and the permit issued within two days of the original application?

A. I only know of one extraordinary incident.

Q. Could you tell me whether or not it's true that in some cases four or five months have elapsed between receiving all of the papers and issuing the permit?

A. The entire pack of papers? No, sir.

THE COURT: How long have you held this responsibility, Mr. Killian?

THE WITNESS: January 26, 1986, January 27, 1986.

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(449) Q. Would past experience be any consideration in whether or not a cleanup bond is required?

A. That's correct.

Q. Would a group that for seven or eight straight years has posted a cleanup bond and had all of the cleanup bond returned after the event by the city be entitled to have this consideration waived, this requirement waived?

A. If they requested a waiver that would be a consideration. However, it's more often the case—when I say previous experience—where it goes the other way, where it's a smaller group that we have to request a bond.

You see, a cleanup bond is something we're very careful about because we want to insure that the area is clean. However, on the—speculating on what you said, I imagine in that case it's possible, yes.

Q. I would like to turn to the question of sound (450) regulation.

A. Yes.

Q. Could you give me some indication or tell me what you remember about your initial information that was given to you by the city once you got your new job about sound problems at the bandshell?

A. Yes. There were many problems with sound at the bandshell, one problem being that groups were often unfamiliar with producing events outdoors and they would come in with inadequate equipment and both their event and also the audience who was there to see it would suffer.

Q. Could you tell me who told you that?

A. I can say that I conducted a number of interviews with people within the department. I don't think I can say for a fact which individual it was.

Q. Can you tell me which individual it might have been?

A. I had a number of meetings.

MR. PINES: I object to the form of that question.

THE COURT: Sustained as to form. You can ask him to be more specific with whom he had interviews.

Q. Can you tell me who you spoke with when you were first hired—

A. Certainly.

(451) Q. —who briefed you about your job?

A. Well, I consider that two different questions. I was—the amount of people I interviewed were people who were working hands on, Kate Pearson being one of them, William Dalton being one of them, Sheldon Horowitz being one of them, Ron Cianciulli being one of them, and other people in other offices who were directly at events or directly dealt with permit procedures, all the way down to the section foremen. So that's where I received my information from.

Q. This may be repetitive. Let me get this clear in my mind. Do you have any recollection of any specific individual who you have just named telling you that there had been a problem with bad sound amplification technique at the bandshell?

A. Well, I think almost—many of the people said that there were problems with sound there. I mean, you know—

Q. I am not talking about problems with sound. I am talking about bad technique.

A. I can't name an individual. However, it was brought up numerous times.

Q. Did you at any time inquire as to what the basis was for this claim that bad sound amplification technique was a problem?

(452) A. I did, and it seemed to be the answer was people came in with inadequate equipment or perhaps an inexperienced sound company or perhaps someone who hadn't worked outdoors before.

Q. But you don't remember who told you this?

A. That's correct. I can't name a person.

Q. But you asked about it?

A. Sound was one of many concerns I asked about when I was creating not only the guidelines but a format for use of the bandshell.

Q. What did you do to attempt to find out the truth of this claim that band sound amplification techniques were the problem?

A. Well, it's the kind of thing where it's difficult to say what would be constituting bad sound amplification, and I did not try and contact any of the sound companies that had been there before or any of the vendors who had been there before. I have worked in special events before. I know that there are companies who are excellent indoors and you get them outdoors and they are going to be terrible, or they are excellent—for instance, someone speaking into a microphone, you can use smaller speakers, and if you want a band you need special microphones for different instruments and different amplification techniques.

(453) Q. What did you do to determine whether or not there was a problem with the quality or the technique of the sound amplification which had been used in the past at the Naumburg Bandshell?

A. In the interviews with people I took their word on face value that that had been a problem, and I am not sure of any other

way one could research it without having audio tapes. For instance, on all of the special event forms you will notice we weren't requesting who their sound company was, we weren't requesting an inventory of their materials. So it was a little difficult.

Q. All right. What did you do to attempt to cure the problem which you took on faith existed, the bad technique or bad sound amplification?

A. That wasn't the only problem with sound at the bandshell, and what I did—

Q. I didn't say it was the only problem. I said what did you do—

A. I took the lump sum of all the problems at the bandshell in regards to sound amplification and—

Q. What were the other problems with regard to sound?

A. Well, one of the other problems is we have Sheep Meadow, which is a designated quiet zone, in fairly close proximity to the bandshell.

(454) Q. Could you tell me what that means, designated quiet zone?

A. I don't think I could tell you the letter of the law.

Q. Do you know whether there is any law regarding Sheep Meadow?

MR. PINES: Your Honor, I object on the grounds of relevance and this witness' competence to testify about the state of the law.

THE COURT: Well, he has said that this was one of the other sound problems he had with respect to the shell.

MR. PINES: He has established that the Sheep Meadow is a quiet zone, which I think is not contested. What the source of that regulation or provision is—

THE COURT: I will permit the inquiry to be made. The witness says the Sheep Meadow is a designated quiet zone and counsel wants to know what that means. I will permit it.

Q. What does that mean?

A. What we try and do in the department is we're trying to serve all the people who use the park, and generally Sheep Meadow is regarded as a quiet zone, which means if you're going to listen to a radio or a Walkman it's with earphones. Generally what we try and do at the (455) bandshell is keep the music within the concert ground confines rather than bleeding out to other areas.

Q. I don't think that is responsive to the question. The question is—you have said that one of the considerations was that Sheep Meadow was a designated quiet zone—what does it mean that Sheep Meadow was a designated quiet zone?

A. I am not sure I can answer you in a legal way. All I can say is that it is generally regarded within the department as an area that is either radio free or if you have a radio that you're listening on earphones. It is a place where we try and have quiet for people to sunbathe or do whatever they wish at Sheep Meadow. Beyond that, I—that's how we regard it, that's how I regard it in terms of events taking place at the bandshell.

Q. Who do you mean by "we"?

A. I am speaking of other employees I work with at the Parks Department.

THE COURT: What strikes me about your phrase "designated quiet zone" is the word "designated." In English to me that means a particular and precise designation, as in a designated hitter in the American League. Everybody knows who he is because the manager says so.

THE WITNESS: I can say it's designated by the (456) Mayor and the parks commissioner, but I can't say exactly what the precise—

THE COURT: Is it in writing or a document of any sort that you know of?

THE WITNESS: I haven't seen a document personally.

THE COURT: All right.

Q. What other problems with regard to sound?

A. Sound amplification is a problem. For instance, we have on a given day, Saturday or Sunday, in Central Park 100,000 people. We're trying to serve as many of them as we can. There have been numerous studies done of the park, a user survey and other ones, that clearly point out that most people come to the park for passive recreation. Relaxation, napping, walking, are popular pastimes. Of course, we don't do that exclusively. I mean, there are ballfields. There is all kinds—there is roller-skating, there is volleyball, and certainly the bandshell is an area for concerts and speeches.

Q. Have you in looking through these studies found anything which indicated to you that the level or type of First Amendment activity in Central Park was such that usage in the park was being reduced by others, that is, people other than those attending the First Amendment-related events?

(457) MR. PINES: Your Honor, I object to the form of that question.

THE COURT: I confess, Mr. Fosbinder, I just don't follow that at all. Rephrase it.

Q. You made reference to certain studies which indicated that the primary purpose of most visitors to the park was passive recreation, is that correct?

A. That's correct.

Q. Is there anything in those studies which tells you that First Amendment activity has become so loud or so pervasive that usage of the park overall has been reduced?

A. There is nothing that says that. However, one of the things in the user study that was done was that the bandshell in particular was not managed by the Parks Department. Now, the Parks Department clearly saw as a result of this study that management was necessary there, direct hands-on management that hadn't been there previously.

Q. Did you have occasion to employ a person as a consultant regarding sound at the Central Park bandshell, the Naumburg Bandshell?

A. Yes.

Q. What was it that you asked that person to assist you in doing?

A. Although I have produced special events, I am (458) not a sound expert, and I wanted someone with a bit more experience to assist me in finding companies that were both quality companies who had worked outdoors, familiar with park systems, and had a good inventory of equipment to provide for all the various groups we were going to have at the bandshell.

Q. Did you ask this consultant to advise you on ways to limit the spread of sound from the bandshell?

A. I spoke with our consultant that we wanted to have sound at the bandshell on the concert ground, that general area. However, we also felt that beyond the concert ground area and into all the other areas surrounding that area we wanted to see how we could, in a real quality way, keep it in this general concert ground area.

Q. Is that a yes?

A. Rephrase the question. I mean, what—

MR. FOSBINDER: Could you repeat the question?

THE COURT: Read it back.

(Question read)

A. Yes.

Q. Thank you. Did you receive suggestions from the consultant on ways that the spread of sound could be limited?

A. Yes.

(459) Q. And what were they?

A. Essentially, they were employing some of the different sound firms that we were looking at.

Q. Were there any more specific recommendations, such as speaker placement, type of speaker, type of amplification?

A. Well, I was familiar myself with one type of speaker placement, where you get it up over the crowd and come down, and I remember discussing it with the sound consultant. However, I don't know what his opinion on that—I believe his opinion was that that perhaps may be more effective but it would be extremely costly.

THE COURT: Was that consultant Mr. Gary Floyd?

THE WITNESS: That's correct.

Q. Do you recall any other suggestions that the consultant made regarding the problem?

A. I can't think of anything right now.

Q. At any point during the period last year when New York Sound provided the sound did you make measurements at the Central Park West property line?

A. At Central Park West?

Q. Yes.

A. I am not certain. We had the Department of Environmental Protection out for a couple of events that New York Sound had done the sound for. They did (460) measurements. I don't know if it was particularly Central Park West. I know they went to some different points in the park, but I am not certain about Central Park West as a specific location.

Q. Do you have any specific knowledge that would tend to prove that New York Sound could achieve a better ratio of sound at the bandshell to sound at the Central Park West line, for instance, than RAR did?

MR. PINES: Your Honor, I object to the form of that question.

THE COURT: Overruled. The witness may answer.

A. Well, I am considering it. It's a very difficult question to answer. One of the concerns that we had is we're not presenting one event there on one date.

Q. Did you conduct any tests, did you engage in any studies, did anyone make any measurements that would tend to support the claim that New York Sound had a better ratio, that is to say, it was louder at the site and quieter at the Central Park West line, for instance, than Rock Against Racism?

A. We had the Department of Environmental Protection both at the Rock Against Racism event and also at a couple of other events.

Q. Did they make measurements at the back of the crowd at both events?

(461) A. I believe they did.

Q. Did they make measurements at some determined point farther away than the back of the crowd?

A. I believe they did.

Q. Do you know what the results of those measurements were?

A. I would have to take a look at the specific study.

Q. Do you remember if RAR's ratio of sound at the site to the sound at some other distance away was worse than the group hired by the City of New York?

A. I believe it was.

Q. Do you remember how much?

A. I can't—decibels, off the top of my head, I couldn't say.

Q. Do you know where the sound was measured?

A. I would have to look at the study. I believe—

Q. Is there a study?

A. I believe they took measurements both at the back of the bandshell—

Q. Is there a study?

A. There is a preliminary report.

Q. Okay.

A. If I could answer your previous question—can't do that? Okay.

MR. FOSBINDER: Just one moment, your Honor.

(Pause)

MR. FOSBINDER: That's it. No more questions at this point.

CROSS-EXAMINATION

BY MS. LIBERATORE:

Q. How long have you held your present position with the Department of Parks?

A. January 27—it was the Monday—of 1986.

Q. Were you employed prior to commencing your employment with the Department of Parks?

A. No.

Q. What kind of work did you do?

A. Prior to that? Prior to that I was both a performer and also a consultant for special events.

Q. What kind of performing did you do?

A. I worked—

MR. KINIGSTEIN: Objection, your Honor.

THE COURT: No, I will take it, see what the witness' background is.

A. I worked in a number of situations, primarily as a clown and as a mime, a juggler. I worked in schools, theaters, parks, auditoriums, all kinds of different performing arts facilities.

Q. Would you describe your work as a consultant?

(463) A. Yes. Primarily I worked with either corporations or municipalities on creating special events. It could be a music concert, it could be a multifaceted performance series, it could be a series of workshops. All different kinds of events.

Q. Did you work for the City of Grand Rapids, Michigan?

A. Yes, I did.

Q. Would you describe your work for that city?

A. Grand Rapids, Michigan had malled off an outdoor street in their downtown area and they were trying to create some kind of festive atmosphere there. So they contracted with me and I created a series called City Celebration. It was a series of about 40 different events that would happen on different days called City Celebration, matinees on the mall, and there was music, there was theater, there was dance, all kinds of different events.

Q. And it was your job to coordinate—

A. I created everything from, you know, choosing the groups to actual on-site responsibilities for sound, you know, moving vehicles in or out or making sure everyone was fed or all the different kind of activities like that.

Q. Did you have any experience with audio technology during the years prior to your work with the Parks Department?

(464) A. I worked at a radio station in Detroit, Michigan, WABX, which was—it was a rock and roll radio station, and I both produced special public—public affairs and also did news there. I was a news broadcaster and as such I had a pretty good amount of experience with audio technology, though not as an engineer per se, but as a technician.

Q. Would you describe your general duties and responsibilities as a program director for the bandshell?

A. Yes. It's my job to coordinate, process permits for the public use of the bandshell, also to program it. Last year we had a series called Summer Stage of different events, music, dance, theater. I oversee all kinds of—the sound permits, vehicle permits, do on-site negotiations with people, arrange anything—any of the details that are necessary for a successful event there.

Q. Do you know if there was any management of the bandshell area before your position was created?

A. No. There was no direct manager there.

Q. Could you briefly describe the process an applicant went through in order to secure a permit to use the bandshell area before your position was created?

A. It was a bit problematic because someone would apply at the Manhattan borough office of special events, then they would—for a permit application. They would (465) have to get a sound permit somewhere else. Oftentimes they would have to get vehicle permits somewhere else. And in all cases the office of special events was a clearing house for paper but didn't necessarily and I don't think in any case did on-site work, which was one of the things the Parks Department sought to remedy, to consolidate much of this, and also to have an office that was actually there at the event, because—you know, it's a little difficult if you're just processing paperwork to know what really goes on out in the field.

Q. Did the creation of your position affect the process you were just describing?

A. Yes. We—when I say "we"—the department sought to make this a bit easier on people and also to establish some guidelines, so people clearly knew what was expected and also what the Parks Department would attempt to provide, and to that end they established my office under the visitor service section of the Central Park administration.

What we did, we took the permit procedures from the Manhattan borough office and I took those on along with the vehicle permits, along with the sound permits, so that everything could come out of one office.

Q. Do you know what percentage on average of the special events permits issued for Central Park involve the (466) use of the bandshell in one manner or another?

A. Half, 50 percent of the total.

Q. How many are there total?

A. Total in Central Park I believe are about 330, 340 permits.

Q. And approximately half involve using the bandshell?

A. Yes. I think it's upwards of 160, 175, something to that effect.

Q. Given those numbers, do you know how the level of usage of that area compares to the level of usage of other park facilities in New York City?

A. It's the most used facility in the five boroughs.

Q. Do you know how the number of events drawing large crowds at the bandshell compares to the number of such events at other park facilities in New York City?

MR. KINIGSTEIN: Objection.

THE COURT: Yes. Define large crowds.

Q. Do you know how the number of events drawing crowds in excess of 1000 people at the bandshell compares to such events at other facilities in New York City parks?

A. It's the largest one drawing in excess of 1000.

Q. Do you know how the bandshell is designed acoustically?

A. It was built in 1923 as an acoustic bandshell. (467) It's kind of a hexagonal shape, limited stage area, which is why the department has built a stage extension, but it's designed as an acoustic shell.

Q. When you assumed the position as program director for the bandshell do you know if there were any rules whatsoever that governed the use of that area?

A. There were no site-specific rules that governed that area.

Q. How did the administrator at Central Park administrate the use of the bandshell before your arrival?

A. Well, in all honesty, there was next to no management there, there was next to no administration. That's one of the problems that both public users had and also the department had.

Q. How would that cause a problem for a public user?

MR. FOSBINDER: Objection. This is sort of hearsay about hearsay about hearsay. This witness wasn't even here when all this was going on.

THE COURT: No, but—

MR. FOSBINDER: I am just not sure how he is qualified to testify about any of this.

THE COURT: I do think what he can tell me about the conditions before he came on the scene is rather limited, that is, a limited ability. If you wish him to describe how his own administrative responsibilities give (468) assistance in these matters I will permit that.

MS. LIBERATORE: Your Honor, I would submit that his knowledge with respect to what rules existed at the bandshell area is relevant to his state of mind when he was codifying or drafting the guidelines at issue in this suit.

MR. FOSBINDER: If I could have a word.

THE COURT: Look—

MR. FOSBINDER: This is a central point to us. I have attempted to elicit from Mr. Killian who it was who told him about a great number of problems which he has allegedly been solving and he has been unable to provide the name of a single individual. Now he is being asked to testify at even greater length about problems that existed and this is something that I would love to cross-examine whoever contended that there were problems and I am not able to.

Mr. Killian wasn't there, doesn't actually know anything, who even told him what. That's the whole point of cross-examination and I am not getting any opportunity to do it at all.

THE COURT: He wrote the rules, so I understand.

MS. LIBERATORE: Yes, he did.

THE COURT: He is in a position to testify as to what concerns he thought he was addressing in the rules. I will permit him to do that. If the objection is that he (469) should not be permitted to testify to those points, I overrule it. There may then be further cross-examination triggered by such testimony, but I will permit this line of inquiry.

MS. LIBERATORE: Thank you, your Honor.

BY MS. LIBERATORE:

Q. I think it's been your testimony that there were no real codified rules to govern the bandshell before your arrival, before you assumed the position of program director?

A. That's correct.

THE COURT: How do you know that, sir?

THE WITNESS: Well, it was clear in interviews with people that—there were discrepancies in people's stories over what went on and what the permit said or who did what, when and where, and clearly many of the people had not been at the events, only they had heard from a section foreman, "Hey, did you hear what happened on Saturday?" So there wasn't a lot of—there was no written information that was site specific. There were general park regulations, but there were no—there was nothing in writing about use of the bandshell.

THE COURT: Did a time come when someone asked you to undertake crafting the first draft of use guidelines for the bandshell?

(470) THE WITNESS: Oh, that was from the initial interviews I had for the position. One of the things they sought was direct management, but they also saw a need for some guidelines for use of it, some parameters. But that was from the very early initial interviews.

THE COURT: All right. Go ahead.

Q. Could you describe what your understanding was as to the difficulties associated with the fact that there were no codified rules to govern use of the bandshell before your position was created?

A. It made it difficult for the department to discern what groups were using the facility to their best advantage and what groups were taking advantage of the department. It was difficult, without a set of guidelines specific to such a well-used facility, to get any sense of parameters, of what was allowed, what was not allowed, what the department could effectively manage and what it couldn't manage. In fact, there were situations where the department was literally in over its head and could not manage certain events because there were not guidelines for that facility.

Q. When you assumed your position as program director did you do anything to address the problems associated with this area?

A. I first began by, again, interviewing a host of (471) people within the department.

Q. Why were you conducting these interviews?

A. Well, I wanted to ascertain what problems actually were there and what was truly happening there, what discrepancies there were, identify problem areas and see how we could solve those.

Q. And how did you anticipate being able to solve the problems?

A. Well, by drafting a set of guidelines, I felt that people would be given an outline to work from, and then they could point-by-point go through the steps necessary to have a successful event there.

In all honesty, we're trying to service groups. I mean, one of the difficulties is most of the people who use the bandshell are not producers, they are independent, they are ad hoc, whatever, and they come to use the facility and they don't know about sound or they don't know that we have no bathrooms there. They just don't know. So what we're trying to do is service them by saying here are the kind of things you're going to need to know about, here are the things that the department requires, and you can go to this office and get it done.

Q. Did you use any knowledge that you had acquired as a performer and a director of musical events in the past in drafting the proposed guidelines?

(472) A. Well, I knew generally—when you produce an event you know the general things, sound, light, seating, if there is a back stage area, bathrooms, those kind of general things. I mean, I used my experience to bring forth to the area.

Q. In addition to utilizing the knowledge acquired in your other positions, what other references, if any, did you use in preparing the guidelines?

A. I'm sorry. Could you say that again?

Q. You have just testified that you used knowledge that you had acquired previous to coming to the Department of Parks when you were drafting the guidelines. What other references did you use when you were planning to draft the guidelines?

A. Well, for instance, I spoke to not only people within the department but I also spoke to people in Brooklyn who produce events there at the Prospect Park Bandshell. The particular organization is called Celebrate Brooklyn, and they produce I think

about 40, 45 events each year, and they have a similar facility. I also spoke with the special events director in Brooklyn, the assistant—the former assistant special events director in the department, I spoke to—of course, Ron Cianciulli, Kate Pearson, Bob Russo, all gave me input to the drafting of these guidelines.

(473) Q. Aside from individuals you might have discussed the proposed guidelines with, did you use any records or reports?

A. Yes. I went through all of the previous years—I think it was the previous three years—special event permit applications, and I went also through a number of reports that had been filed on various groups who used the facility.

Q. I believe when Mr. Fosbinder was examining you you discussed usage reports concerning Central Park.

A. Yes. I also looked through—there was a user survey done, which was conducted by the Central Park administration, and also a general survey conducted by I believe it was the City University of New York Graduate Center, which studied use patterns through the various parts of the park, and also there was an extensive report written on the management and restoration of the park, and I studied that report, because as a result of that report my position was created. So I was trying to again get the idea what the department was trying to do at the bandshell.

Q. After your discussions and other research did you ultimately draft use guidelines for the bandshell?

A. I did.

Q. Were those guidelines promulgated by the Department of Parks?

(474) A. They were.

Q. Do you know approximately what date they were promulgated?

A. They were signed by the commissioner on May—excuse me—March 21, 1986.

Q. This is a six-page document that has now been marked as Defendants' Exhibit F. Do you recognize that document, Mr. Killian?

A. Yes, I do.

Q. Would you tell the court what it is?

A. These are the use guidelines for the Naumburg Bandshell in Central Park that I drafted.

Q. Is the document marked for identification as Defendants' Exhibit F an accurate copy of the use guidelines currently applicable to the bandshell?

A. Yes.

MS. LIBERATORE: Your Honor, I offer these into evidence.

THE COURT: Yes, I receive them. Actually, they form a part of the joint exhibit, Exhibit 1.

MR. FOSBINDER: I would object.

THE COURT: You would? All right. State your objection.

MR. FOSBINDER: The objection is that in between insurance and vehicle on page 4 something has been crossed (475) off.

THE COURT: The witness says that the document now before me as Defendants' Exhibit F for identification are the regulations currently in force.

Is that your testimony, Mr. Killian?

THE WITNESS: Yes, sir.

MR. FOSBINDER: I thought he said these were the ones promulgated on that date in 1986. I just want to make sure that the record reflects—

THE COURT: Quite right. Are they offered as the regulations currently in force?

MS. LIBERATORE: Yes, your Honor.

THE COURT: Is there objection to that offer?

MR. FOSBINDER: No.

THE COURT: Then I receive it.

(Defendants' Exhibit F for identification was received in evidence)

BY MS. LIBERATORE:

Q. Mr. Killian, let me direct your attention to page 4 of Defendants' Exhibit F.

A. Yes.

Q. There is an area that is blackened out on that page, is that true?

A. That's correct.

Q. Could you explain what originally was in that (476) place?

A. Originally there was essentially a ban on posting of handbills and distribution of literature.

Q. Could you explain why it's now blackened out?

A. In the—prior to this year, in I guess it was late April or early May of last year, when we were in the same situation we currently are before the court, we were advised by counsel to strike that, and that's what I have done ever since.

Q. So it was at that time that this provision was stricken from the guidelines?

A. That's correct.

Q. As the program director of the bandshell, have you ever applied the provision concerning the distribution of literature to any users of the bandshell?

A. No, we haven't.

Q. To your knowledge, has that provision concerning distribution of literature ever been applied against any users of the bandshell?

A. Not to my knowledge.

Q. Do you know whether the provision concerning distribution of literature currently is in effect?

A. There is nothing in effect regarding distribution of literature. We have stricken it from the use guidelines and that's the extent of it.

(477) Q. If you know, do you know why that language hasn't actually been removed from the guidelines as opposed to just stricken out?

A. To be honest, I didn't understand the procedure. On the advice of counsel last year, he said this should be stricken, and since then that's what we have done, we have either whited it out or crossed it out, in similar fashion that it appears here.

Q. Have you learned since then of any other procedure?

A. Well, yes, I have. I didn't understand it at the time, that there was a procedure, some sort of public record that we have to go through to do that. I didn't understand that. I am not a lawyer.

Q. To your knowledge, has the formal procedure been put into place or—

A. It has started, yes.

Q. Eliminating from consideration the provision concerning distribution—

THE COURT: Before you move on, if tomorrow, Mr. Killian, you receive an application for a special event and in responding to that application you wish to send the applicant a copy of the

bandshell guidelines, what sort of document would you send to your applicant?

THE WITNESS: This is what I send out, as this (478) is, xeroxed with—

THE COURT: As this is?

THE WITNESS: Yes, that's right.

THE COURT: You send them a xerox with the blackened area?

THE WITNESS: That's correct.

THE COURT: All right, fine.

THE WITNESS: This is how it goes out.

THE COURT: All right.

Q. Eliminating from consideration the provision concerning distribution of literature contained in the use guidelines, do the rest of the use guidelines apply to all sponsors of events at the bandshell regardless of the type of event or expression presented there?

A. Yes, they do.

Q. In drafting these guidelines was it your intention to in any way limit or restrict the type of events that were performed at the bandshell?

A. No, not the type of events.

Q. What was your intention in that regard?

A. Our intent was to continue to reflect the great diversity of New York City and to, again, service as many different groups as we could. At the bandshell, because of the volume of applications we receive and the number of events we have, we try to create some broad guidelines that (479) would be applicable to all of these groups, and that's what we have done.

Q. Do the use guidelines for the bandshell contain a provision governing the regulation of sound amplification within the bandshell?

A. It does, the guidelines do.

Q. Could you briefly describe what that provision involves?

A. The provision requires users to use a Parks Department vendor who provides a sound system.

Q. As the primary author of the use guidelines, could you explain why you included a sound amplification provision in those guidelines?

A. Well, there were problems with, again, groups who were using the facility who weren't familiar with either outdoor sound or perhaps they had employed someone who—

MR. FOSBINDER: Your Honor, I object again. After extensive cross-examination, he has been unable to identify a source of this information, and given that he can't tell us who said it to him, he wasn't there at the time, I am at a loss as to how he is competent to testify about it.

THE COURT: He is competent to testify about what motivated him. That I will permit.

(480) A. That was one problem. An additional problem was noise levels from various groups using the facility, complaints both from park users and also nearby residents.

Q. What factors did you take into account in deciding that the sound level at the bandshell as opposed to the type or the quality of sound should be controlled?

A. We took into consideration a number of things. One was we wanted to be certain that whoever was providing sound out there was a quality sound company, that they were familiar with outdoor work and they could take into consideration the number of factors for containing sound to the concert ground area, and

that may be weather, it could be foliage on the trees, all kinds of conditions like that.

Q. You have mentioned that one of the problems that prompted you to draft this provision was the noise issue, the sound level issue.

A. Yes.

Q. Focusing on that issue at this point, what factors led you to consider a sound amplification provision for the bandshell?

A. Complaints. Park user complaints was the primary reason, nearby residential users' complaints, in addition to the fact that the number of events that are held there—you know, when you're holding 100 events or more or hosting up to 160 events you receive a great volume (481) of complaints.

MR. KINIGSTEIN: Objection, you Honor.

THE COURT: At the time you drafted these regulations had you personally received any complaints about sound level?

THE WITNESS: I had looked through the records.

THE COURT: Tell me what you did in that regard.

THE WITNESS: In that regard, there is a number of—the police keep a log of any sound complaints that have been received, letters that were received, and I simply went through those. I did not go any further than that, however.

THE COURT: And as you can best remember today, what sort of information did that inquiry develop which then had an effect upon the working of your own mind?

THE WITNESS: It seemed to be, in discussion with people in the department, that sound levels were continuing to bleed out beyond the concert ground area for many events. They were just simply going into other areas of the park. And that seemed to be a great concern to the department, because most of the phone calls

centered around that. They centered around "I am over here on the other side of the park and I can't even enjoy—you know, I can't sit here, relax," whatever.

Q. The physical location of the bandshell area (482) within Central Park, did that influence you to try and control the sound level within that area?

A. Well, the bandshell is in the heart of the park, and if you look at the design, the way Olmsted and Vaux designed it is you would walk up this mall, this promenade, and you would spill out onto the concert ground, and as such you would then go possibly to Rumsey Playground, possibly to Sheep Meadow, or you would be drawn up to Bethesda Terrace. I mean, we call it the heart of the park because that is where the majority of people are. They are somewhere between 56th ad 72nd between Fifth Avenue and Central Park West. That's where the bulk of our users—if they are not there, they pass through there, and that's a great concern of ours.

Q. You have mentioned when Mr. Fosbinder was examining you the location of Sheep Meadow in relationship to the bandshell.

A. Yes.

Q. Did that influence your concern about sound level?

A. Absolutely. Absolutely. Sheep Meadow is one of—a real area that people flock to, especially on the weekends, especially on a good day. People enjoy sunbathing there and relaxing. That was a real consideration.

(483) Q. Do you know approximately the distance between the bandshell area and the Sheep Meadow?

A. From the back of the concert ground, which would be the west side of the concert ground, I would guess it's 100 yards, maybe 150 yards.

Q. Did I interrupt you?

A. No, no.

Q. Do you know if there are any Department of Parks regulations or rules aside from the use guidelines that relate to sound levels or to noise within the park?

A. Yes, there are rules—there are general New York City Department of Parks rules and regulations.

Q. Mr. Killian, you have testified that you reviewed phone logs form the Police Department—

A. Yes.

Q. —any complaints that were generated with respect to sound prior to your coming to the Department of Parks?

A. Yes.

Q. Did you review the logs themselves?

A. They have—if you go to the Police Department, they have a log. While it gives you the name and address, it's just a brief notation.

Q. You looked at those specific reports, you didn't just rely on what people at the Parks Department told you?

(484) MR. KINIGSTEIN: Objection.

THE COURT: Yes?

MR. KINIGSTEIN: I objected, your Honor.

THE COURT: So you did. Why?

MR. KINIGSTEIN: It was leading, I thought.

THE COURT: I will take the answer.

A. Yes, I looked at them specifically.

Q. When you read those complaints about noise, did that have any effect on your drafting of the use guidelines?

A. Well, clearly it identified a problem of noise at the bandshell.

Q. This is, I believe, a 12-page document. Could you identify what has been marked as Defendants' Exhibit G?

A. These are the City of New York Parks and Recreation rules and regulations.

Q. Is this an accurate copy of the general Parks Department rules and regulations that are presently in effect?

A. Yes it is.

MS. LIBERATORE: Your Honor, I offer Defendants' Exhibit G into evidence.

THE COURT: Is there objection to the offer?

MR. KINIGSTEIN: No.

THE COURT: Received.

(Defendants' Exhibit G for identification was (485) received in evidence)

BY MS. LIBERATORE:

Q. Do you know if Defendants' Exhibit G contains a provision relating to unreasonably loud sound?

A. I believe it does.

Q. Can you locate that provision and state the page and section number in Defendants' Exhibit G where it appears?

I just realized that this document doesn't have any page numbers. So you have to just count pages.

A. It's—I am guessing—page 6, section 15.

Q. Section 15 is I think sufficient. Would you read the provision that relates to—

MS. LIBERATORE: Could I have a moment, your Honor?

THE COURT: Yes.

(Pause)

MS. LIBERATORE: I withdraw the question, your Honor.

THE COURT: Very good.

Q. It's been your testimony that these general Parks Department rules and regulations contain a provision concerning unreasonably loud sound or excessive noise?

A. That's correct.

Q. Were you aware of this provision when you were (486) drafting the use guidelines for the bandshell?

A. Yes. Yes, I was.

Q. Did you take it into account at all?

A. Absolutely. It's a concern of the parks that Central Park and that general area, again, be an area people wish to come for passive recreation, also assemblies and concerts and whatever. But that they would generally be in that concert ground area. So noise was a real factor and I based much of the use guidelines around these regulations and around that noise regulation in particular.

Q. You have discussed the factor of sound quality within the bandshell as opposed to just the sound level.

A. Yes.

Q. Do you know if there is any relationship between the use or the failure to use proper amplification techniques and the level of sound?

A. Yes, there is a great deal—a great relationship there.

MR. FOSBINDER: Objection.

THE COURT: The ground?

MR. FOSBINDER: He appears to be testifying as an expert and he is not an expert in the area of sound amplification.

MR. LIBERATORE: Your Honor, I submit, given his experience as a producer of amplified events, he could (487) certainly have the sense, if not an absolute scientific explanation, he certainly has a sense concerning sound levels and proper amplification.

THE COURT: I am not at all sure I can permit him to testify as an expert. On the other hand, he retained an expert. You may ask him as to what was in his mind on these various aspects when he drafted these particular regulations.

Q. At the time that you drafted the use regulations, Mr. Killian, did you consider the relationship between sound level and proper amplification at the bandshell?

A. Yes, I did, quite a bit.

Q. Could you explain in what way?

A. Oftentimes groups that use outdoor—if they are not familiar with outdoor—even if they are, they will use loudness and simply a loud decibel level to make up for—they may not be able to mix the sound very well and yet they feel that they can turn it louder, and excessively loud, that that makes up for it, and they try and, in a certain sense, override the mixing.

MR. FOSBINDER: Objection.

THE COURT: I will permit. You can pursue it on cross if you like.

MR. FOSBINDER: Thank you.

Q. Did you find that there was any relationship (488) between lack of proper amplification and perhaps too low a level of sound?

A. Prior to drafting of the guidelines I didn't have specific examples of that. However, last summer, when, you know, I was at 90-some percent of the events, that was the case.

Q. Did the factor you described about poor amplification and higher sound levels than perhaps were appropriate influence you when you were drafting the provision concerning sound amplification?

A. Yes.

Q. How did it influence you?

A. We were looking for a way that we could provide quality sound and yet sound that did not bleed over into other areas of the park, and it seemed to be that there had been vendors who were doing a poor quality job, and one of the ways they were doing a poor quality job perhaps is turning it as loud as it could go rather than doing a proper mix.

THE COURT: Prior to taking on your present responsibilities you did have no personal observations or bases for that, true?

THE WITNESS: True.

Q. The provision concerning sound amplification in the use guidelines, does that provide that the Department (489) of Parks contract with a private sound company to provide sound for events held at the bandshell?

A. That's correct.

Q. Did you consider other possible ways to address the concerns about sound level and sound amplification at the bandshell?

A. We considered other options. One option is negotiating with each group individually, attempting to agree on a decibel

level. Another option is having the public user bring in their own sound system but we provide the technician. And then the third option seemed to be getting an independent vendor to provide sound, someone with extensive experience in all phases of music and dance and theater to provide sound. We eliminated the first two options primarily based on practicality and went with the third option.

Q. Why did you believe it impractical to hire a technician to work on sound equipment provided by private sponsors?

A. Most technicians prefer to work with equipment that they are familiar with, either that they own or that they have worked with extensively. It is rare that a technician will come into a facility that they have never worked, use someone else's equipment, and then promise to put on a good show. If they do, I think it's rare when you (490) get a good show.

Additionally, were we to do that I think it would be difficult, not only because they are not familiar with it but because they would be just unclear with the whole setup of the bandshell and how it worked and how it amplified music.

Another option was identifying a decibel level. But that from my reading of previous DEP reports and also with different groups that the Parks Department had worked with seemed to be impossible to enforce, you know, because picking out a decibel level, be it 70, 75, 80, 90, whatever you want to pick, is very, very difficult when you're out there on the day of the event because you have a lot of different factors that play in regards to temperature, foliage, whatever. So the third option seemed to be the most viable.

Q. Did the Department of Parks consider buying a sound system?

A. Purchasing one was considered. However, to have a large enough inventory and also to have a vehicle, the personnel, the storage, the insurance, seemed prohibitive on our first year out,

especially because sound equipment when purchased should be for that site. What works on one site necessarily won't work the best on another site.

The department felt that this was our first year (491) in attempting to do this, let's see what works best, and to that end we contracted with an outside consultant. He made a recommendation. We took the recommendation and we saw what kinds of equipment we needed, what we didn't need, what we would purchase perhaps in the future.

The other thing is the department assumed no liability for that equipment. For instance, if a microphone goes out, it wasn't our responsibility to run and go get another one, but it was that outside vendor's.

Also, you have to have a very large inventory when you're doing the number of events we're talking about. If a tape deck goes you've got to have backup tape decks, or if a digital relay unit goes you've got to have backup for that. You have to have storage and you have to have some assurance that it's not going to be stolen.

Q. After the decision was made to contract with a private sound company what steps did you take in reaching or finding an appropriate sound company?

A. Well, I contacted Gary Floyd, a sound consultant, and he assisted in getting bids from different groups and also drawing up essentially a menu of what our basic needs were, and then the sound companies bid with the various equipment they owned or they would recommend. I believe it was a total of between five and seven bids that were ultimately collected and that he reviewed.

(492) THE COURT: Before you get into the details of that I want to put one question to you on the prior subject, which was the use guidelines and the particular function played by the vendor, the sound vendor.

THE WITNESS: Yes.

THE COURT: In the proposed conclusions of law that I am asked to adopt by the city in this case, Mr. Killian, paragraph 6 says this:

> "The guidelines seek to regulate sound levels without reference to speech content through a requirement that all sponsors use the sound amplification equipment and professional staff retained by the department for all bandshell events."

My question is in what manner do the requirements of equipment and staff operate to regulate sound levels. What is the connection there?

THE WITNESS: Those staff members are actually at the board mixing and listening to it, setting up the equipment, all that, but in terms of regulation, in terms of mix, most sponsors chose to elect someone from their own group to say "Hey, we need a little bit more on the bass or we need a little softer here, a little stronger here." Those people would be at the mixing board with the vendor's technician advising them.

What we sought to do was to reflect as much as (493) possible the users' wishes for their sound mix while at the same time attempting to regulate that bleed into other areas of the park.

THE COURT: Fine. That's responsive to what I had in mind. Let me follow it up with another question.

In the event that a disagreement broke out between the sponsor of the event and the vendor's professional staff as to sound level, who controls that, whose hand is on the button, so to speak?

THE WITNESS: I can give you an example. And I can say that the actual sound technician's that we employ or contract with hand is on the button. But, for instance, a case in point is the New York Grand Opera. I was at the back of the concert ground. The sound was very soft. However, their person at the mixing board

prefers it that way. I personally would have boosted it so that the people there could hear it, hear it a bit more effectively. However, their person at the mixing board chose not to do that. However, it is our vendor who we employ whose hand is actually on the dial. But that—you have to separate I believe volume from mix.

THE COURT: I am talking volume now.

THE WITNESS: It is the vendor's hand that is there. However, in all events, you've got a group, you've got a person from that group saying "I need a little more (494) here, I need a little bit more there," and you're constantly monitoring. It's not that you set it on 5 and that's agreed upon.

If more people arrive, more bodies are absorbing sound, you have to bring the level up a bit. If there are more people there perhaps you have to bring the level up a bit. It's a great sensitivity and it's a relationship between a delegate from that sponsor and also the technician. In the end, though, that person is our contractor.

THE COURT: Fine. Thank you.

BY MS. LIBERATORE:

Q. Did you give Mr. Floyd, your consultant, any instructions with respect to his way of evaluating the different companies that had submitted bids?

A. I gave Mr. Floyd just general guidelines, that I wanted somebody with outdoor experience, good quality reputation, and also a good inventory, and I wanted to make sure they could do the number for events we were talking about. Many sound companies are one or two people and a van and I wanted to make sure they could do an entire season without breakdown.

Q. Was price among the most important factors considered in this evaluation?

A. Price was one factor. Quality and inventory was (495) the primary factor.

Q. Did Mr. Floyd ultimately recommend a sound company as his first choice?

A. Yes.

Q. Do you know what company that was?

A. New York Sound.

Q. Do you know why New York Sound was selected as the number one choice?

A. New York Sound was selected because they had the best equipment in Mr. Floyd's eyes. They had the most extensive state of the art equipment and they had the most backup and they had extensive outdoor experience.

In addition, all things considered, they had what I would say is the lowest bid. If you look at it strictly bottom line, there was one vendor who came in slightly under New York Sound. However, New York Sound offered a very good rain date policy that—and also they offered a per diem price rather than a per event price, which made their bid the lowest bid.

Q. Did you ultimately select New York Sound as the company?

A. Yes.

Q. And was your selection based on Mr. Floyd's recommendation?

A. Yes, it was.

(496) Q. Did New York Sound in fact provide the sound amplification system for the bandshell—

A. Yes.

Q. —in '86?

A. Yes.

Q. Was there any event held at the bandshell in 1986 in which New York Sound did not provide the sound amplification system?

A. There was one event.

Q. What event was that?

A. Rock against Racism.

Q. Was New York Sound also hired to provide sound amplification for the events that the Parks Department itself produces at the bandshell?

A. Yes.

Q. After you had selected New York Sound as the company to provide sound in 1986 did you contact the private sponsors who had put in applications to use the bandshell for the 1986 season?

A. Yes, though I had already contacted many of the private sponsors previous to the actual selection on New York Sound.

Q. What was your purpose in contacting them?

A. Well, we had a tech requirement form that they would fill out and they would say, you know, "I need X (497) number of microphones, speakers, amplifiers, I need a reel-to-reel deck or I need a cassette deck." Just so that we could then give that to the sound vendor and they could say, "Okay, May 21, I need to have two tape decks, one reel-to-reel and X number of microphones out there."

Q. So before you informed them that New York Sound would be the sound company you informed them that under the use guidelines they would be required to use a sound company provided by the Department of Parks?

A. That's correct. At the time the guidelines were completed we still hadn't collected—Gary Floyd hadn't issued a recommendation. So we knew the general bids, I had seen the

general bids. but he hadn't evaluated point by point all of the equipment.

Q. Did the private sponsors voice to you any kind of reaction when they learned that the use guidelines now required them to use a private company selected by the Department of Parks?

A. Across the board, I think everyone was concerned.

Q. What was the nature of their concern?

A. When you're doing outdoor events the thing that it all hinges on is your sound amplification, your sound reproduction. So every group was concerned. They didn't know what kind of equipment they were going to be getting, you know, and—they just didn't know.

(498) Q. Did any private sponsors who had previously expressed an interest in having an event at the bandshell decide not to have an event because the guidelines required all sponsors to use the Parks Department sound company?

MR. KINGSTEIN: Objection, your Honor.

THE COURT: I will take the answer. My preference, gentlemen, is that when one attorney starts off with a witness he sees it through. So I will hear from Mr. Fosbinder in connection with this witness.

I will overrule the objection. You may answer.

A. Not to my knowledge.

Q. Do you know how many amplified events were held at the bandshell in 1986?

A. It was in the range between 50 and 60, I believe.

Q. Could you describe the types of events that were held throughout the 1986 season?

A. We had every kind of event almost possible. We had public users who had speeches, we had poetry, we had opera, we

had dance, we had theater, we had jazz, we had new music, we had new composers, we had children's performances, we had groups—many, many different ethnic groups from throughout New York City.

Q. Did any of the private sponsors of events at the bandshell in 1986 ever complain to you that the level or quality of sound provided by New York Sound was inadequate (499) for their event?

A. No.

Q. To your knowledge, did any private sponsor of an event in the bandshell in 1986 express to any other official at the Parks Department any dissatisfaction with the level or quality of sound provided by New York Sound?

A. No.

Q. Mr. Killian, it's been your testimony that before these private sponsors had events at the bandshell they expressed concern.

A. Yes.

Q. But after their events had taken place at the bandshell did any of those companies, private sponsors, rather, express concerns again?

A. No. Actually most were pleased. I know at least in one case the group went out and employed New York Sound for another event. But everyone was concerned.

Using, for instance, the New York Grand Opera as an example, their concern is to have the best sound on the concert ground. They had been using a sound vendor for a number of years that in essence they had personally trained and for them to give over the authority to the Parks Department made them very nervous, because they live and die on sound reproduction. But they were extremely pleased with the sound system, as were such diverse groups as the (500) permit that's here. I know that the Fourth Wall Repertory Theater was pleased, as were other groups.

MR. FOSBINDER: Objection. This is hearsay.

THE COURT: The witness may testify as to expressions of satisfaction or dissatisfaction that were made to him personally.

Does that qualify, Mr. Killian? Did you receive some of these comments yourself, personally?

THE WITNESS: Personally, yes. All the comments I am now speaking of I received myself.

THE COURT: Expressions of state of mind or satisfaction the witness may testify to.

A. I think it's normal—

THE COURT: There is no question before you.

THE WITNESS: Excuse me.

Q. To your knowledge, did any of the private sponsors of events at the bandshell in 1986 hire New York Sound to provide sound amplification for events that they held at other times—

A. Yes.

Q. —or at other locations?

A. Yes.

Q. Did you attend any of the privately sponsored amplified events held at the bandshell in 1986?

A. Privately sponsored—I attended almost the (501) entire season of events at the bandshell last season.

Q. Approximately how many events would that be?

A. Total, probably somewhere around 100, perhaps more.

Q. Were all those events amplified events?

A. No. There were some acoustic events, there were some dance events without amplification. So it varied.

Q. At the events that you attended that were put on by private sponsors did you observe any interaction between the private sponsors and the sound technicians employed by New York Sound?

A. Yes.

Q. Do you know what the nature of those interactions were?

A. The private sponsors would basically designate one person to be at the mixing board and to say to the technician at the board what their preference on sound quality was.

Q. What effect if any did the private sponsor's interaction with the New York Sound technicians have on the sound generated by New York Sound at their event?

A. I think New York Sound tried to reflect the sponsors interest as best as possible.

Q. Did you or anyone else with the Parks Department or the Police Department get involved in any way with the (502) adjustments being made by New York Sound to accommodate the requests of private sponsors concerning the quality of sound?

A. Well, occasionally I would intercede and say it's a little soft in this area, perhaps you need more bass or less bass, you know, because I would be walking the perimeter of the concert ground throughout the event. When you're at the board itself it's difficult to find out what's at the back, what's behind you. But those were suggestions.

Q. Were your suggestions controlling in that area?

A No.

Q. Was there any interference by city employees in the relationship or the interaction between the New York Sound technician and the private sponsors when it came to tone or quality of sound?

A. Not to my knowledge.

Q. What instructions if any did you give New York Sound technicians regarding sound amplification at the bandshell?

A. I gave New York Sound a basic set of instructions that we wanted the best quality we could get there, that they could produce there, the best mix possible, to provide whatever equipment the sponsor essentially needed to produce that event, and that we had a concern for (503) containing the sound in the concert ground area and where possible to control bleed into the outside areas.

Q. When you say that you were concerned about the quality of sound at the event, if the events were provided by private sponsors would the Department of Parks' determination of quality of sound be the governing determination?

A No.

Q. Who was it left to then?

A. That's left to the sponsor.

Q. What was your purpose in attending the events at the bandshell in 1986?

A. Well, to be an effective manager I think you have to be there. My purpose was to observe as many events as I possibly could, as many diverse events as I could, and to collect and gather information so that I could form an accurate portrait experientially myself.

Q. While you were at those amplified events did you monitor the sound level at the events?

A. I would say that I was very aware of the sound level. I did not personally monitor the event with a decibel meter.

Q. I am not talking in scientific terms. Did you stand in one place during these events, did you pay any attention whatsoever with respect to the sound?

(504) A. Yes, yes.

Q. What did you do in monitoring that sound level in that way?

A. Well, the first responsibility is to see what the mix is, and when you speak, of the mix you're talking of the relationship of the instruments to each other and the instruments to the vocals, if there are any, and you want to make sure that people are not hearing drums or bass excessively over other instruments, and you listen for that, you make sure that vocals can be heard, and you monitor that.

In my case, I would also walk around to other areas. I would walk back to Sheep Meadow, what we call Mineral Springs, Cherry Hill, the dead road area, down the mall to 65th Street, and see how much bleed or bounce there was on a given day.

Q. Did you take any action during any of these events that affected the sound level itself?

A. I suggested at a few events that the sound level be raised because I didn't think that it was—it could be heard throughout the concert ground area or was too soft in some areas.

Q. And that was just a suggestion on your part?

A. That's correct.

Q. Do you remember if the sponsors—I think you (505) have already testified that the Grand Opera in fact did not want the sound level raised.

A. That's correct. They had their own reasons for a softer mix and that was simply respected.

Q. Did you ever suggest that the sound level was too loud or too high?

A. There were occasions when the sound level was too high, and I think it's a situation where you have someone at a mixing

board and they can't hear it in other areas of the park. You know, you simply go to the sponsor or you bring the sponsor out to that point and then we go to the board and change it.

Q. Did you observe as New York Sound set up its sound equipment for the bandshell events that you attended?

A. I observed the setting up.

Q. Do you know how many vehicles New York Sound used to transport its equipment to the bandshell?

A. One van.

Q. Do you know how long it took New York Sound to set up its sound equipment at the bandshell?

A. Approximately 45 minutes to an hour.

Q. Did you observe the manner in which New York Sound attached its sound system to the source of electricity at the bandshell.

A. Yes, I did.

(506) Q. Could you describe how that hookup was done?

A. It's done through through three tails, what are called tails, out of the main electric box. They are large cords that are fused to 100 amp fuses. There is a tail that comes out and you simply hook another tail in and there is a large rubber overlay.

Q. And New York Sound utilized these tails you're describing?

A. That's correct.

Q. I would like to direct your attention to the Rock Against Racism permit application for 1986.

MR. LIBERATORE: Do you have it? It's plaintiff's Exhibit 102, I believe.

THE COURT: How much more do you have, Ms. Liberatore? It's not that I want to curtail you in any way, except that I must hear another matter in chambers.

MR. LIBERATORE: It will probably be at least another 25 minutes.

THE COURT: We will have to break off then. You are available tomorrow morning, are you not, sir?

THE WITNESS: Yes.

THE COURT: That is a leading question that I am entitled to.

We will be adjourned until 9:30 tomorrow.

(Adjourned to 9:30 a.m., March 31, 1987)

* * *

(507) (Trial resumed)

JOSEPH KILLIAN resumed.

THE COURT: Counsel may continue.

CROSS-EXAMINATION CONTINUED

BY MS. LIBERATORE:

Q. Mr. Killian, yesterday you were testifying about times during the 1986 season when you would escort private sponsors to the periphery of the bandshell area to monitor the sound level at their events.

A. Yes.

Q. Could you describe the process that you went through with private sponsors in more detail, please?

A. Well, generally, once an event is under way we need to alter the mix to please the sponsor depending on the group, depend-

ing on their instrumentation. Oftentimes, (508) if it's a musical group, from song to song they will change their instrumentation, possibly adding drums or different horns or whatever the case is. We will also be adding microphones.

I then take the sponsor and we walk them to three or four sites on the bandshell, first on the concert ground and then on the periphery, so that they are assured that there is a good mix and they are assured of the quality. At that time they also tell me if they like any adjustments made.

Now, sometimes we walk with the technician, sometimes not. Sometimes we will just go back to the mixing board and they will give their instructions directly to the technician. It depends, again, on the sponsor and how concerned they are about sound. Quite honestly, some sponsors are concerned less than others.

Q. That's as concerning the mix or the sound quality in the bandshell?

A. That's correct.

Q. With respect to the sound level, you testified concerning taking sponsors out to the periphery to monitor that level.

A. That's correct.

Q. Would you describe that more?

A. Again, we're on a walking tour of a couple of (509) different points throughout the bandshell. It's very personal in that sense, where if we're on the dead road, which is just beyond the concert ground or beyond that—

Q. Is that location on this map, on Defendants' Exhibit A?

A. Yes.

Q. Could you point it out, please?

A. On this map it's actually called Center Drive, but we refer to it as the dead road because—

THE COURT: The dead road, you say, sir?

THE WITNESS: That's correct.

THE COURT: Show it to me again.

THE WITNESS: Right here. The concert ground is here. The road is closed, which is why we refer to it as the dead road.

THE COURT: That's not an acoustical phrase?

THE WITNESS: No, it's not. It is a vehicle phrase.

Q. The dead road is the Center—

A. Center Drive.

Q. And that's on the left side of this map, is that true?

A. Well, you have Sheep Meadow right here. This is Center Drive or the dead road. Here is the bandshell. This is the concert ground.

(510) Q. Let me give you a pen to mark the area. Take this red pen and mark the area that you're referring to as the dead road.

A. That's this area here, this entire road.

Q. Just put a C there.

(Witness complied)

Q. You would take private sponsors out to the dead road area for what purpose?

A. To identify essentially not only the mix, but at that point essentially how loud the volume is. I also take them to different points on the concert ground nearer to the bandshell, but that's—that particular area, again, what we call the dead road, or as called on this map, Center Drive, is where the roller skaters skate, it's also where the volleyball players are, there are trick bicyclists there. That area, if you can hear sound at that level, essentially you're beyond the concert ground.

Q. Can I just back up a moment. Why do you refer to it as the dead road?

A. It's referred to as the dead road because it's closed to vehicles.

Q. So you would take a sponsor out to the dead road and you could hear the concert at the dead road area. What action would you take at that point?

A. Well, again, sometimes you will have bleed there. (511) So it would be discussed with the—when I say bleed, bleeding of sound. We recognize that that's going to happen, depending on weather and other conditions. But essentially I would discuss it with the sponsor and we would say "I think it's excessive," and in most cases they would agree or disagree, and we would go back to the technician.

Rarely, though—most sponsors are most concerned with sound on the concert ground, because that's where their audience is, and it's—I can't even think of an instance where there was any kind of disagreement at that point along the dead road. Certainly within the concert ground and within the audience parameters there is always discussion, and in all those situations it's deferred to the sponsor to make the judgment in those cases.

Q. So it's your recollection today there were no disputes between yourself and sponsors when you took them to an area like the dead road to monitor sound level?

A. That's correct.

Q. I also want to go back to another issue that you discussed in your testimony yesterday. In your experience, if sound at a musical event is improperly amplified does that create any type of audience reaction?

A. It always does. Audiences are always complaining. They are upset, they are disturbed by the (512) sound. Either they can't

hear, possibly it's too loud, possibly they can hear too much of one instrument and not another.

THE COURT: That's just the point. What did you mean by your question, Ms. Liberatore, improperly amplified in respect of mix or in respect of sound level?

MS. LIBERATORE: I am referring to not the sound level. I am talking about the method through which amplification is done within an outside bandshell type area.

THE COURT: You're talking mix, not level. All right. The witness may answer that, although I am not certain how pertinent that is to this inquiry. You may answer, sir.

A. Again, it is—in most cases, even though the Parks Department may not be sponsoring an event, we receive the complaints, and complaints are quite natural for groups that—if the sound is bad they complain. When I say bad, primarily I am speaking of the mix here. It's uneven or too soft in some areas, too loud in other areas.

Q. In your experience, has the audience in that type of situation ever become disruptive?

A. I think there is a potential for that. We did not at our concerts last year have any disruptive experiences, at ones that we sponsored or ones that we provided the sound for. I think there is certainly the (513) potential for that.

MS. LIBERATORE: I would like Plaintiff's Exhibit 2. I have a copy of it.

MR. KINIGSTEIN: You want the one that I showed you yesterday?

MS. LIBERATORE: Yes, the 1986 permit application.

MS. LIBERATORE: It's Plaintiff's Exhibit 1.

Q. Do you recognize what is Plaintiff's Exhibit 1?

A. This is an application filed by James Fosbinder, the attorney for Rock Against Racism, for an event to be held in 1986.

Q. Is there a line in that application that refers to the number of vehicles?

A. Yes. The number of total vehicles here is listed as 23.

Q. Would it cause the Department of Parks any concern if 23 vehicles were permitted to travel through Central Park on a weekend day in the spring or the summer?

A. Yes.

Q. Why would it cause concern?

A. Well, the first thing one must understand is that all of our park drives are closed to vehicles on weekends from—generally it's early April to after the New York City Marathon. As such, park users take up the (514) entire width of the lanes, either runners, bicyclists, again, joggers, skateboarders, and they really don't expect to see traffic, they don't expect to see vehicles at all.

It's also problematic because on a given day there are more events in the park. Some of those involve running races, bicycle races, marathons, many jogging things.

So that the drives are already in use and vehicles are very dangerous. There is a high rate of incident of people being injured in the park by vehicles. People drive on the drives assuming that they are just on a normal street and they are just driving through New York and they don't expect to encounter as many people as they do basically covering the drive.

So vehicles pose a real problem for us in terms of getting them in and parking them and providing for the safety of other park users.

Q. Do you know what type of information the Department of Parks requests from a private sponsor before issuing a permit for a vehicle?

A. Yes.

Q. Would you describe that type of information?

A. The basic information the department requests are the owner of the vehicle, the vehicle identification number, the license plate, color, make, year and model of (515) the car. Then on the vehicle permit we also put the agreed upon entrance, the agreed upon exit, if there is to be parking or not parking, and how many hours the vehicle may be there to unload or load. That's the essential vehicle permit.

Q. Do you know why that type of information is requested?

A. That information to the department is essential in case of injury, in case someone is injured, in case there is any safety problem, in case a vehicle is abandoned, concerns like that, if someone is to be hit.

Again, it happens quite frequently in the park, where there are these altercations or near altercations. We feel it's our responsibility to know who the vehicles are and what they are doing. That extends to delivery vehicles, you know, delivering hotdogs to the vendors, all vehicles like that. Especially the concern is on weekends, because that is when we have the most park users in the park and the drives are closed all day.

Q. If a private sponsor was to indicate to you that they were going to use a rented vehicle would that change the type of information the Department of Parks would request from that private sponsor?

A. Well, as much as possible, we request the same information. However, in the case of rented vehicles, (516) obviously they don't know the specific vehicle they are going to be getting that Saturday morning or that Friday evening. So we request the owner of the firm, the manager and a phone number, so if it's a rental vehicle we know who—at least what firm was providing it

and a manager that we can call so we can ascertain who is responsible for the vehicle if there are any problems at all.

Q. Would you explain how the information that the Parks Department requests with respect to vehicles is helpful in the event or necessary in the event of an injury?

A. Well, we can identify the vehicle immediately, we can identify the owner and the vehicle ID number, so that it limits the case of potential hit-and-run accidents, things like that. That's been the case and that's just a concern, to protect park users.

Q. Let me direct your attention to the Rock Against Racism event at the bandshell in 1986. Were you present at that event?

A. Yes, I was.

Q. Did you observe the Rock Against Racism sponsors set up the sound equipment for their event?

A. Yes, I did.

Q. Do you know approximately how many vehicles Rock Against Racism used to transport their sound equipment to the bandshell in 1986?

(517) A. I believe they used for sound equipment alone two vehicles.

Q. What types of vehicles were used, if you know?

A. They had a tractor-trailer rig, essentially a flatbed trailer with a canvas covering, and also a school bus.

Q. Does it concern the Department of Parks when private sponsors use a vehicle such as a tractor-trailer?

A. Well, a tractor-trailer is—first of all, it can be a difficult vehicle to drive in the park because of the way the park drives and the roads are created. If you look on the map, the methods of access and egress for vehicles are all curved, they are all broken, and the drives themselves are not that wide.

Additionally, park users don't expect to see tractor-trailer trucks in the park. You've got—I don't know the exact size of their truck, but it may have been a 40-foot bed. I'm not certain. It causes—it just increases the potential danger to people in the park. It's also a difficult vehicle to park.

THE COURT: Are the defendants going to argue that this vehicle was brought on contrary to permit?

MS. LIBERATORE: No, your Honor. We're trying to establish—

THE COURT: Then why are we hearing all this? (518) Permission was given for it. That's an end to it. Let's move on.

Q. How does the type of vehicle used by Rock Against Racism to transport their equipment compare to the vehicle used by New York Sound?

A. New York Sound uses one van.

Q. Let me direct your attention to Plaintiff's Exhibit 1 again.

A. Yes.

Q. Does the application indicate how many hours Rock Against Racism requested to use the bandshell area?

A. On this application they are requesting to use the bandshell area from 4 a.m. to 4 a.m., and in parentheses they have written 24 hours.

Q. Does the application also indicate the number of hours of actual performance time Rock Against Racism requested?

A. It's listed as 12 noon to 10 p.m.

Q. Would it concern the Department of Parks if it was to grant a permit application that requested a total of 24 hours of bandshell use?

A. Yes.

Q. Why?

A. To use the facility we require management there at all times. So you're talking about 24-hour on-site (519) management, which in the view of the Parks Department is excessive. In all cases, with exception to this particular application, general setup time is allotted as two hours, both before the show and after the show. 24 hours in the view of the Parks Department to have a crew on and to have a staff for that time is simply excessive for a performance event.

Q. Do you know at what hour the representatives from Rock Against Racism arrived at the bandshell area before the scheduled noon event in 1986?

A. I believe it was on or about 6 a.m.

Q. Do you know approximately how long it took Rock Against Racism to set up for their event?

A. I can say that they were not ready for performance till I believe it was 12:30, 12:45 in the afternoon. Whether they spent the entire time setting up is debatable. But it was a period of from 6 in the morning to 12:30, 12:45.

Q. How does the amount of time Rock Against Racism used to set up their event in 1986 compare to the amount of time New York Sound would have used or did use in other events of the size of Rock Against Racism?

A. Generally, two hours is what is given. Of that, the sound company needs approximately 45 minutes to one hour to set up, and then we have a one-hour preparation (520) time, what we call sound check time, so that they can meet with the band, make sure everything is miked correctly and then they can start on time.

Q. Did you observe the manner in which Rock Against Racism attached their sound equipment to the source of electricity at the bandshell?

A. I observed how it was connected. I did not actually observe the connection.

Q. Could you describe the way it was connected?

A. I went in and looked in the electrical room and they had directly wired their sound system to our box. In effect, they were getting direct power without being fused. They went by our tails. So potentially there was nothing to fuse—the amps that we have were not fused and there was nothing to fuse in case of overuse of electricity, there would simply be a fire.

Q. Does it make a difference whether you utilize the tails, as you are describing, in the electrical unit as opposed to hooking right into the unit?

A. The tails are a safety factor. They are fused as in a home, though they are fused at a higher rate. They are fused at 100, as opposed to a home rate, which might be 15 or 20. So in the case of overuse of electricity you would blow a fuse. In this case, since they went directly into the box, there is no fuse to blow, and what happens (521) next is a fire.

THE COURT: What would catch fire, New York City or the equipment?

THE WITNESS: Well, the equipment primarily, and then from there, of course, it depends on how extensive the fire was and how quickly it was put out. When I say the equipment, the equipment coming from the box.

Q. How does the manner in which Rock Against Racism attached its equipment to the electrical source at the bandshell compare to the method used by New York Sound at the same bandshell?

A. Well, as I said, by going into tails it's a safety factor, so you're fused.

Q. And New York Sound used the tails?

A. That's correct.

Q. From the Department of Parks' perspective, are any problems created when private sponsors seek to use Park Department facilities with which the sponsors are unfamiliar?

A. Well, it poses many problems, because people, even if they have used the facility before, perhaps are not familiar with electrical hookups, perhaps they are not familiar with the backstage area, perhaps they are not familiar with the entire staging, and I think that there are some danger elements involved. And then there are many (522) operational kind of concerns that we have also.

Q. Selecting one sound company to provide sound at the bandshell, did that address any of those problems?

A. No, it alleviates a number of problems. The more familiar a sound company is with the electrical system and the outdoor concert ground and the shell itself the better sound they can provide each time. There is a consistency factor.

It also alleviates many headaches on the part of the Parks Department because then you have someone who knows the facility and you don't always have to be reeducating both the technicians and the performers to that particular facility. They know how to tie into the electrical system, they know what its capacities are, and they know what the needs on the concert ground are.

Q. After the Rock Against Racism event in 1986 did any complaints come to your attention concerning that event?

A. Yes.

Q. Could you describe the nature of those complaints?

A. There were a number of letters that had been written regarding sound level on that particular day and there were a number of phone complaints also.

MS. LIBERATORE: I would like to have this correspondence marked as Defendants' Exhibit H, H1, 2, 3 (523) and 4.

Let me just indicate that they are all copies except for one, the first letter that Mr. Killian is going to be looking at.

Q. Do you recognize those correspondence that have been marked as Defendants' Exhibit H?

A. Yes, I do.

Q. Could you describe what those correspondence relate to?

A. Generally, these all relate to the Rock Against Racism concert of 1986.

Q. Do you remember when those correspondence that have been marked as Defendants' Exhibit H first came to your attention?

A. They came to my attention, you know, a matter of days after the performance.

MS. LIBERATORE: Your Honor, I offer Defendants' Exhibit H in evidence.

MR. FOSBINDER: I am not going to object.

THE COURT: I receive them.

(Defendants' Exhibits H 1-4 for identification was received in evidence)

Q. Could you just indicate the addresses from which those correspondence were sent, if they are indicated at all?

(524) A. Yes. One was sent from 80 Central Park West, one is 101 Central Park West, 10 West 66th Street, and also an additional one from 10 West 66th Street.

Q. Do those correspondence indicate why they were complaining about the Rock Against Racism event?

A. It appears that they were complaining regarding the volume level of sound.

Q. Do they indicate that they were complaining about the content or the type of music?

THE COURT: They speak for themselves. I will read them.

MS. LIBERATORE: Very well. Thank you, your Honor.

Q. Has a private sponsor ever suggested to you that an exception to the sound level regulation be made for their event because it is presented for only one day?

A. That's the general attitude of most sponsors, I think.

Q. What is your response to that suggestion?

A. My response is that if we were only having one concert at the bandshell in the summer I think we could make exceptions. However, we don't have one concert there, we have many concerts, we have many amplified concerts. So it's not an inconvenience to park users for one day but it rather represents a summer-long inconvenience. I feel if (525) we grant an exception that everyone is open to that exception, and then we multiply all of our complaints 50 fold or 60 fold, depending on the number of amplified dates.

MS. LIBERATORE: This is Defendants' Exhibit F I am going to put before the witness.

Q. Let me direct your attention to page 2 of the use guidelines that have been marked as Defendants' Exhibit F.

A. Yes.

Q. Do the guidelines require that a private sponsor at the bandshell pay a fee to use the Department of Parks-provided sound system?

A. Yes, it does.

Q. What is that fee?

A. The user fee is $100 per performance hour plus a one-hour sound check is charged.

Q. When you selected New York Sound as the sound company that would provide the sound system for the bandshell in 1986 did you come to some sort of understanding with that company concerning the cost of its services?

A. Yes.

Q. Could you describe that understanding?

A. The understanding essentially was we would guarantee them—when I say "we," I mean events sponsored (526) or cosponsored by the Parks Department—a minimum of 50 performance dates.

Q. And in exchange for that guarantee what did New York Sound—

A. They would provide two technicians, all of the setup, you know, liability, all the inventory, and complete services in regards to whether we needed a 16-channel board, 24-channel board, 32-channel board, if we needed a mix from the stage and a separate mix from the concert ground that would be provided, and that was the essential agreement, that they would provide all of our sound needs for this fee. In addition, we worked out a policy regarding rain dates and if we should have two events in a day, how that would be charged, things like that.

Q. Do you know what the cost was to the Department of Parks for the season for New York Sound having provided the amplification?

A. Well, when we include the private concerts and we also include the events that were cosponsored with the Central Park Conservancy, I believe the total bill was somewhere between $24,000 and $26,000.

Q. Was this cost for the entire season considered reasonable by the Department of Parks?

A. I think it was a very reasonable fee.

Q. Did Mr. Floyd give you any opinion with respect (527) to the fee that was going to be charged?

A. Mr. Floyd felt it was a very good fee considering not only the number of show but also the quality and extensiveness of equipment they were providing, in addition to the fact that they were providing two technicians for each concert. And again, they were assuming liability, and insurance, repairs, delivery, and storage of the equipment.

Q. Does the $100 per hour sound system fee set forth in the guidelines bear any relationship to the cost to the Department of Parks for the sound system provided by New York Sound?

A. It's close, depending on the event. But it's fairly accurate.

Q. At the end of the 1986 season did you do a calculation comparing the amount of money received by the Department of Parks from private sponsors with respect to the performance fee and the amount of money that the Department of Parks paid New York Sound for the privately sponsored events that they provided sound for.?

A. Yes, I did.

Q. And what did that calculation demonstrate, if anything?

A. The Department of Parks lost money. It was a differential of a few hundred dollars. We almost broke (528) even, but we did lose some money.

Q. Has it been your testimony—

THE COURT: Tell me in detail what you did, Mr. Killian. What mathematical or accounting procedures did you go through to arrive at that bottom-line conclusion?

THE WITNESS: The $100 or—

THE COURT: No, no. What you just told me, that you lost a few hundred. Tell me what you did to arrive at that calculation.

THE WITNESS: We simply tallied how much we paid New York Sound and how much we received in and there was a difference of a few hundred dollars. New York Sound would essentially pay us on a purchase order—we would work a purchase order with them and then we would pay it out and oftentimes if a group was only using it for an hour or two hours we would be paying much more to New York Sound than we would be receiving from the private sponsor.

THE COURT: All right. Thank you.

BY MS. LIBERATORE:

Q. When you say that you compared the amount of money that Department of Parks paid New York Sound, did you consider all the money, even the money that Department of Parks paid for events which it sponsored at the bandshell?

A. I'm sorry.

Q. All right. Let me rephrase it.

(529) A. Yes.

Q. You did a calculation based on how much money the Department of Parks paid New York Sound?

A. Yes.

Q. In doing that calculation did you consider all the events at which the Department of Parks—

A. Yes, yes, even the events we cosponsored with the Central Park Conservancy.

Q. In doing the calculation to determine whether you lost money or made money from the private sponsors paying you did you consider even the events that the Department of Parks sponsored itself?

A. Yes, yes. Now, those—the ones that we cosponsored, again, that the cosponsorship was with the Parks Department and

the Central Park Conservancy generally paid the sound fee for those, and they just paid it at the full rate.

Q. I believe yesterday you testified that all the private sponsors, with the exception of Rock Against Racism, used New York Sound—

A. That's correct.

Q. —in the 1986 season?

A. That's correct.

Q. Did they all pay the $100 per hour performance fee?

(530) A. No.

Q. Do you remember how many private sponsors did not pay that fee?

A. I believe two did not.

Q. And why didn't those private sponsors pay the fee?

A. One was a dance company from Vancouver, Canada, and they were coming to the United States on a tour and they simply wanted to perform at the bandshell, but they didn't have the money to pay for the sound system. They obviously were paying their own way to come to New York City to do a performance. But they requested that the fee be waived because they were taking on so many costs and they couldn't pay it.

In another event—

THE COURT: And was in fact the fee wavied for that company?

THE WITNESS: That's correct.

THE COURT: All right. Go ahead.

A. There was another group that couldn't pay the fee. I believe it was Theater For A New City. What we did there, since we

were getting a per day fee from New York Sound, not a per event fee, and the Central Park Conservancy and the Department of Parks were sponsoring an event later in the day, we simply put Theater For A New (531) City on stage beforehand, and I believe—I am not certain the entire fee was waived. I believe they may have come up with a partial payment.

Q. To your knowledge, has the $100 an hour performance fee ever resulted in any private sponsor being excluded from using the bandshell?

A. Not to my knowledge.

THE COURT: I suppose the visitors from Vancouver would have been excluded had you not waived it, correct?

THE WITNESS: I am certain they would have been excluded, yes. That's why they requested the waiver.

THE COURT: Yes.

Q. Is that also why the Department of Parks gave them the waiver?

A. That's correct. And the same is true in the case of Theater For A New City.

Q. In drafting the use guidelines did you include any provision relating to the hour or length of performances that could be held at the bandshell?

THE COURT: Before we pass on to that, let me put this to you, Mr. Killian. Based on the actions you have told me that you took with respect to the Vancouver group and the Theater For A New City, would it be correct for me to infer that the department has a policy of waiving (532) the user fee if the applicant demonstrates an inability to pay or would that not be a fair inference for me to draw?

THE WITNESS: I think that would be a fair inference, yes.

Q. Do you remember the question I asked?

A. Excuse me. I don't.

MS. LIBERATORE: Do you think the reporter might be able to read it backwith respect?

THE COURT: Read it back?

(Question read)

A. Yes, we did.

Q. Could you locate that provision in Defendants' Exhibit F?

A. It's on page 2, under the heading Hours and Dates of Use.

Q. Would you briefly describe what that provision says?

A. Essentially what the provision says is for a performance event we allot two hours with a pre-setup time of two hours and a post-takedown time of two hours.

Q. And with respect to festivals, does it provide anything?

A. Festivals—and I quote here—"Festivals may be permitted between 12 p.m. and 6 p.m."

Q. Does it also provide anything with respect to (533) morning amplification of sound?

A. Yes. We request that amplification—music not be amplified until noon.

Q. Why did you include that, that specific provision, in the guidelines?

A. Well, generally it's in deference to nearby park residents and also park users. Morning hours tend to be hours people want to come to relax and enjoy the serenity of the park. At noon I think it's a bit more accepted for music and other events to begin.

Q. Are you familiar with any studies concerning the use of Central Park in the morning hours?

A. Yes, I am.

Q. What do those studies demonstrate, if anything?

A. It's a much higher percentage of people who come to use the park for what we generally refer to as passive recreation. Again, that's walking, strolling, general relaxation, resting.

Q. Did you consider the studies in drafting the guideline which generally prohibits amplified sound before—

A. Yes. Yes, I did.

Q. Why are festivals permitted between the hours of noon and 6 p.m. at the bandshell?

A. Well, the department certainly recognizes that there is a need for multiperformance events. I think (534) festivals are very unique in New York City and we enjoy those and we enjoy hosting those. The six hours though is used as a guide because you need a minimum of, you know, two hours before and two hours after. So you're looking at, for park staff, a ten-hour day.

Additionally, after 3 o'clock or 3:30 in the afternoon we have much, smaller work crews, much smaller, much reduced cleanup crews for the entire park. So it's difficult to clean up and it's difficult to restore the area to the shape it was prior to the festival.

Q. Why aren't the festivals permitted to go beyond 6 p.m.?

A. The primary reason is we needed to come up with a time that we felt over an entire season long we could effectively manage the facility. Were we to extend it even an hour or two hours we then have difficulties with not only staffing, but I think it gives everyone the right to request one or two hours. So we're not just extending one hour but potentially we're extending 50 hours or 60 hours or 100 hours, depending on the group, how many other groups continue to request longer hours. So we had to design a

time and a format that we felt was a fair parameter for music and theater and speech expression.

Q. Do you know if the level of complaints concerning sound level at the bandshell events bears any (535) relationship to the length of time of the event?

A. It does.

Q. Could you explain what that relationship is?

A. Generally, the longer the event, you will see a rise in complaints. It seems that park users and residents are tolerant for one and a half, two hours, two and a half hours, and somewhere around three hours the complaints begin to increase, and when it's a full-day event of six hours, after that the complaints rise, I think primarily because people have heard it so long, you know, they have heard the festival so long, and it's, you know, utilized that the part of the park for such an extended period of time.

THE COURT: Do you base that answer, Mr. Killian, in part, at least, on your experience during the 1986 season's events at the bandshell?

THE WITNESS: During 1986, yes.

THE COURT: Is it fair to say then you received some complaints about sound in respect of events other than Rock Against Racism?

THE WITNESS: Well, we received some phone complaints, not particiarly in regards to sound, but in regards to when is that event going to be over, you know, how long is that going to go on, those kind of concerns.

THE COURT: All right. Thank you.

MS. LIBERATORE: Could I have a moment, your (536) Honor?

THE COURT: Yes.

(Pause)

Q. The provision that you were just looking at in Defendants' Exhibit F, does it also limit the number of hours of evening performances?

A. On page 3 it states "Evening performances are permitted under certain circumstances. Evening events must be finished by 9:30 p.m."

Q. Why is there a limit on the number of hours a performance can be put on at the bandshell in the evening hours?

A. Well, we have some of the similar concerns that we have—that I have already stated for festivals in regard to limited crews at night to clean up. Additionally, for a nighttime cleanup you've got to bring in light trucks, so that you can see the garbage that's out there, whatever litter garbage is there.

Primarily, we needed to design a time where we felt we could comfortably have performances and still have good relations with the neighborhood and the community boards, and that seemed—the 9:30 seemed to be a fair time, considering that oftentimes a group will go over a little bit, and then there is also the two-hour post performance time. So when we say 9:30 we're talking about (537) our staff being there until 11:30 at night.

Q. Did you compare the amount of litter that's generated at a six-hour festival in the day as to that that's generated in an evening performance of two, two and a half hours?

A. Yes.

MR. FOSBINDER: I object to that. Surely the size is of some consideration or that question is meaningless.

THE COURT: Are you assuming groups of comparable size?

MS. LIBERATORE: Yes, your Honor.

THE COURT: All right. Then rephrase the question to include that element.

Q. If you compare a six-hour performance during the day at which a specific number of participants are involved and an event in the evening at which the same number of participants is involved, is the amount of litter generated any different, to your knowledge?

Withdrawn, your Honor.

In your experience, do daytime festivals draw the same number of people as evening performances at the bandshell?

A. It will vary by the popularity of the group. Generally festivals in the day—generally they will (538) attract more people, I think primarily because there are more people using the park at those hours and they just tend to draw better, you know.

Q. In your experience, does the number of people who are drawn to an event at the bandshell affect the amount of litter that's produced at an event?

A. Yes, generally, that's true.

Q. Does the length of time an event is going on at the bandshell bear any relationship to the amount of litter that will be generated at the event?

A. Yes.

Q. Could you describe what the relationship is?

A. Generally the relationship is—if it's a two-hour event there is a turnover of crowd, and I can't really state why, but when people are there for six hours they tend to stay, they have lunch there, they may have a snack there, they may have dinner there. It's been an all-day event, so they generate more of a pile of litter than a simple lunch.

It's also different than performance events, where it's just a two-hour thing and people are coming, they have eaten before or they perhaps plan on eating afterwards, but not during the event.

That's the main problem. I think ratio-wise it's substantially much higher for a six-hour event, it's (539) not merely three times the amount of a two-hour event, but it's substantially higher than that.

Q. When you're referring to the two-hour event that you have just described are you referring to evening performances?

A. I am referring—yes, a two-hour event, be it evening or be it afternoon.

Q. Are there food vendors in Central Park?

A. Yes.

Q. Do you know at what hour those food vendors enter the park?

A. Well, at the bandshell we will have two to three vendors have concession permits to be there. They come and go generally at their whim. They don't have to be there a set number of hours. However, usually, as was the case last summer, they are gone from the area by 4:30, 5 o'clock, you know, they are out of there.

Q. So there is less food for sale in the evening hours in the bandshell area or in Central Park generally?

MR. FOSBINDER: Leading.

THE COURT: Sustained as to form.

Q. The fact that food vendors leave at 4 or 5 o'clock, as you described, does that have any effect on the amount of litter generated in the park of at the bandshell in particular?

(540) A. Yes.

Q. Could you describe what the effect is?

A. Basically, if no food is being sold there is limited garbage, there is limited litter—that's most of the garbage—unless there is a program handed out or fliers, leaflets that are on the ground. But generally it's all food oriented.

Q. Do the use guidelines contain a provision with respect to insurance?

A. Yes.

Q. Would you locate that provision in Defendants' Exhibit F?

A. It's on page 4.

Q. What does that provision require?

A. Essentially, as it says here, "The city must be named as additional insured on liability and property damage policies. The city must be the sole party insured on the fire and extended coverage policy."

Q. You don't have to read the whole thing.

A. Essentially, it's an insurance policy that we need to see for an event.

Q. In practice, under what circumstances does the Department of Parks require a private sponsor of an event at the bandshell to provide insurance?

A. If a private sponsor anticipates they will have (541) more than 1000 people, either as spectators, performers, in attendance we request insurance.

Q. So as a general matter, if the private sponsor indicates that there will be less than 1000 participants at their event no insurance will be required of them?

A. That's correct, unless previous experience states otherwise.

Q. In the situation where insurance is required, do you know in what amount the insurance is required?

A. It's citywide. It's a $1 million to $3 million policy.

Q. Is this amount uniformly required throughout the Department of Parks in New York City?

A. As I understand it, it is.

Q. Why does the Department of Parks require a private sponsor of an event to provide insurance to cover that event?

A. In most cases, the department has little input upon the actual nature and direction of the event and in such a way we're hosting events that we essentially have limited control over. Therefore, we have no idea what problems are going to anticipate that may arise. So to protect ourselves if someone is injured or if there is any kind of accident, things like that, we request an insurance policy.

(542) Q. Of the privately sponsored events that took place at the bandshell in 1986, what percentage did the Department of Parks require to provide insurance?

A. Percentage. It's a small percent. I think—it's a small percent. I think there is maybe seven or eight groups.

Q. Of those groups that were required to provide insurance, how many actually did provide insurance?

A. I believe with the exception of one, all the other groups provided insurance or riders to the policies.

Q. And which group did not provide insurance?

A. Rock Against Racism.

Q. Do you know why only a small percentage of private sponsors were required to provide insurance for their events at the bandshell?

A. Well, again, it goes by the numbers, and while we have a large number of events, many sponsors anticipate less than 1000.

Q. Let me direct your attention to page 2 of Defendant's Exhibit F. Is there a processing fee charged under the use guidelines for each special events permit application filed with the Department of Parks?

A. Yes.

Q. What is that fee?

A. The fee as stated here is a minimum of $50 with (543) a maximum of $100.

Q. Do you know what the range is?

A. If a sponsor on their application predicts attendance of between 1000 and 3000 I believe $50 is charged, from 3001 to I believe it's 4000 they are charged $75, and above 4001 they are charged $100.

THE COURT: I am sorry. Which provision is this, what page?

THE WITNESS: Provision 1 on page 2, under permits, the special event permit, the processing fees.

THE COURT: I see. All right.

Q. Are those the only three amounts charged, 50, 75 and 100?

A. To my knowledge, yes.

Q. Could you describe the process through which special events applications for the bandshell are considered and evaluated by the Parks Department?

A. After I receive an application, within the department what I do is make copies of that application, circulate them to all of what we call our operations meetings people. Again, that's the

director of special events, the director of maintenance and operations for Central Park, the Manhattan borough special event office, the Urban Park ranger or the Urban Park Services and the Park Enforcement Patrol, the New York City Department of (544) Police, what we call the North Meadow, which is our communications center, the Central Park administrator, and in my case, a copy goes to the section two foreman, which is the section that we're in in the park, for maintenance and operations.

Q. After the application is circulated what action, if any, does the department take?

A. It depends on the application. We have operations meetings weekly throughout the season, generally from February through the end of September, where we discuss all of the applications that come in, not only the bandshell applications. If it is a proposed larger event or a unique event we will set up meetings with the sponsors and we will go through all of their needs, what we need to provide. Perhaps we need to provide more barriers or benches or we have to bring in special vehicles.

Additionally—those will usually be one or two, three meetings sometimes. Then we will always try to do what we call an on-site meeting with the sponsors, where we actually walk them to the site, they look at the bandshell, they look where the vehicles are to be parked, they look at where we're going to put benches, and possibly they have a different configuration of benches they want or different configuration of barriers. So it's a total of a couple of meetings that we will have to have with them. If it's a (545) large event we may have to include other city agencies in it also.

Q. In general, is there a correlation between the size of a proposed bandshell event and the amount of planning that the Parks Department has to undertake?

A. Yes.

Q. Could you describe what the correlation is?

A. Well, again, if it's a simple event, and usually a performance that is two hours, I will, again, circulate copies. I will also speak with the sponsor, perhaps I will meet with the sponsor directly, and at an operations meeting I will announce it, and as long as Ron Cianciulli and John Purvis or someone from recreation has signed the permit, then it will be approved, with limited discussion, sometimes none at all.

If it's a large event, then more people are involved. We may need to involve William Dalton from New York Urban Park Services, we may need to coordinate rangers, we may need more sectional people brought in to provide more barriers, cleanup, and in all cases we try to have as many people at all of the meetings as possible so that everyone understands what their duties and responsibilities are before the event and during the event, and then there is the on-site meeting or perhaps sometimes more than one on-site meeting.

(546) Q. When you say the larger the event, what do you mean, large in what way?

A. Large, primarily we're speaking of anticipated attendance, though it may be a large event too if it's a long event.

Q. Could you estimate what percentage of your time is spent in the application and planning process for the bandshell events?

A. That's difficult to say. It's a high percentage, dealing with the paperwork and the negotiation with the sponsor and then the negotiations within the department. Oftentimes there will be another event going on in the park at the same time, and so we'll have to negotiate within the department of how we can get more security or more people to work the event. So a great deal of time is spent for events just doing that kind of legwork.

Q. Do you have any idea what percentage of time other Parks Department employees spend in this process?

A. In regards to the bandshell?

Q. Yes.

A. It's difficult to say, because for all of that—those eight or handful of events there is a real extensive amount of involvement from various departments within the agency. On smaller events it's primarily my working with the director of maintenance and operation and the sectional (547) foremen.

Q. Do the use guidelines contain a provision relating to anticipated number of participants and the use of the bandshell?

A. Yes.

Q. Could you find that provision in Defendants' Exhibit F?

A. It's on page 3, under Attendance.

Q. What does that provision provide?

A. Essentially, we are requiring groups to host events of less than 3000 in attendance.

Q. Why was 3000 selected as a cap, if I may refer to it as that?

A. I think it's fair to refer to it that way. It's simply statistically looking at the concert ground and seeing how much room bodies need and multiplying it out, and then in addition how much we can manage in terms of cleanup and crowd size.

So the concert ground, we feel 3000 is a fair level for attendance. If groups anticipate they are going to draw larger than 3000 we try as much as possible or I try to refer them to other departments within the agency where we can accommodate that larger number of people.

Q. Let me go back to the application fee for a moment.

(548) A. Yes.

Q. Has the application fee, to your knowledge, ever resulted in any private sponsor being excluded from using the bandshell?

A. Not to my recollection.

Q. If a private sponsor were to indicate to you that it was unable to pay the application fee would you take any action?

A. Yes. It's similar to the sound amplification fee in that when a group requests that a fee be waived I go to an operations meeting and I put it on the table and if necessary we'll waive the fee.

MR. KINIGSTEIN: Your Honor—

THE COURT: No, no. This is Mr. Fosbinder's witness.

MS. LIBERATORE: May I continue?

THE COURT: Hold on. I will see if there is an objection. Any objection?

MR. FOSBINDER: No.

THE COURT: All right. Counsel may continue.

Q. Let me go back to the 3000 cap on the attendance at the bandshell. Does the location of the bandshell bandshell within the park itself affect the number of participants the Parks Department believes should be (549) permitted to attend events there?

A. Yes. One of the things that you have in parks, and specifically in Central Park, is pedestrian traffic, and it's not all that unlike traffic we have here on the streets of New York. The way the park is designed is people enter up through the mall, the mall serves as a tunnel to the concert ground, and what you have is people coming up the mall, and perhaps they want to get to Bethesda Terrace, they want to get to Sheep Meadow, or they want to get to another area in the park. If you go in excess of 3000 what you have is pedestrian gridlock, in essence. They come upon a block and there is no way to move, it's very difficult to get around the traffic, and it becomes problematic. There is a pedestrian flow just like you have a traffic flow with vehicles.

Q. Let me direct your attention to the weeks preceding the 1986 Rock Against Racism event.

THE COURT: Before you come to that, how do you interpret the attendance provision in your regulations, Mr. Killian? I draw your attention particularly to the second paragraph of that regulation, which says this:

> "If the sponsor or the bandshell program director anticipates more than 3000, an alternative site must be considered."

Now, if it stopped there it sounds as if perhaps (550) some consideration should be given, but not mandatory. But then the next sentence goes on to say:

> "For a program to be effective, manageable and with proper security, the crowd size must be limited to the above figure."

Now, my question is what does that regulation mean. Does it prohibit in respect of the bandshell area a crowd in excess of 3000 people?

THE WITNESS: We attempt to do that. However, there have been crowds larger than that size. You know, when you look at the entire concert ground area, you can fit more people. If alternatives have been considered and they have been rejected, either on the part of the Parks Department or on the part of the sponsor, then we consider if we can offer the bandshell safely, and we have done that in fact.

However, I should add that what we're trying to do with all sponsors is negotiate what their anticipated crowd attendance is. If I may give an example. The International Ladies Garment Workers Union hosted a Labor Day Event. They wanted a Labor Day picnic. They also wanted to have Pete Seeger sing at the picnic. We requested that their publicity primarily remain in-house, that is, for their members, so that it would not be an excessive

draw. Were they to publicly say "We're having a (551) Labor Day event with Pete Seeger and a number of other groups performing," we felt that would draw a large, very large, crowd, certainly in excess of 3000, perhaps in excess of 5000 to 10,000. In their case they were very happy because they wanted it strictly for their members, and so they were very happy containing the publicity within their union.

That's what we try and negotiate, so that we can pretty much stick to that figure where possible. There certainly have been exceptions.

THE COURT: So that if you received an application which estimated the number of spectators at 4000 would you solely on the basis of that estimated figure reject the application for the bandshell or would you follow some other approach?

THE WITNESS: I would first attempt to ascertain from the sponsors if that was a true figure. Oftentimes sponsors will make up a number. They really don't know. If it is an accurate figure based on what publicity they are going to do and the kind of groups they are going to attract, the kind of names, you know, that they have, then we will discuss it.

If—4000 I think you have to be lenient on. When you get over 5000, I think—I can't offer another site. What I offer is the other offices within the agency (552) and I suggest that they contact those places. To be honest, oftentimes they will contact those people and then will end up back at the bandshell for whatever reasons.

So at 4000 I think I would discuss it with them and we work it out.

THE COURT: Thank you.

BY MS. LIBERATORE:

Q. In your experience at the bandshell, does the Department of Parks ever just outright deny an application based solely on what the application says with respect to number of participants?

A. In my experience, that hasn't happened.

Q. What is done in that situation?

THE COURT: I think the witness has just told me that. Have you not?

THE WITNESS: Yes, I believe I have.

THE COURT: Asked and answered.

Q. Has the provision with respect to number of anticipated participants ever been applied or had the effect of denying a specific private sponsor access to the bandshell?

MR. FOSBINDER: Object to the form. It's what he actually knows about.

THE COURT: Confine your answer to your personal knowledge.

(553) A. To my knowledge, there is only one event that we denied use of the bandshell. However, we offered other facilities, and the other facilities were rejected on behalf of the sponsor.

Q. Let me direct your attention to the weeks preceding the 1986 Rock Against Racism event.

A. Yes.

Q. Did you contact any representatives from Rock Against Racism about their event?

A. For 1986? Yes, I did.

Q. Who did you contact?

A. I had received a letter—actually, it had been sent to Sheldon Horowitz, who previously handled bandshell permits—from

Christy Robb, and of course I had seen the application from James Fosbinder for the 1986 event.

After I received the letter I first called James Fosbinder and left a message on his answering machine. I also directly spoke with Christy Robb and just told her what the current status of the bandshell was and what the department was trying to do with the bandshell.

Q. Do you remember approximately at what time, what month it was you contacted Christy Robb?

A. I believe it was either late February or early March of 1986.

Q. What was your purpose in contacting this Rock (554) Against Racism representative?

A. Well, I contacted their representative not solely, I contacted a number of other representatives. I had a pile of applications and people were concerned about what was happening with their application. I wanted to inform representatives of Rock Against Racism that the department had reorganized and, in effect, were shifting the bandshell responsibilities for permits from Sheldon Horowitz to myself, and in addition to that I was drafting guidelines for use of the bandshell and I was full-time manager for the facility.

Q. Did there come a time when you sent all applicants for events at the bandshell in 1986 copies of the use guidelines after they were promulgated?

A. Yes.

Q. Did you know approximately when that was done?

A. It was late March of 1986.

Q. Did you also send a copy of the use guidelines to representatives for Rock Against Racism?

A. Yes, I did.

Q. After the representative for Rock Against Racism received the guidelines were you contacted at all with respect to the guidelines by that group?

A. Christy Robb and I spoke and we had—it was a brief conversation. I offered to set up any meetings that (555) they might want to discuss not only the guidelines but the event that they were proposing, as I was doing with many, many other groups at that time. She refused any kind of meeting and essentially said at that point we would have to speak to Rock Against Racism's attorney.

Q. And did you in fact speak with Rock Against Racism's attorney?

A. I spoke with Jim Fosbinder. It was either late—probably late March of 1986.

Q. Did you discuss with him Rock Against Racism's event, proposed event for 1986?

A. Briefly.

Q. Do you remember what the substance of his reaction to the use guidelines was, if anything?

A. Mr. Fosbinder I think was very concerned about the guidelines. Specifically, he asked if I had ever shown the guidelines to a lawyer, he asked if I had ever read the Constitution. He asked a number of questions like that. I offered to set up a meeting with representatives of the different departments of the agency. He refused and said he would take us to court.

Q. Did the Department of Parks in fact have a meeting with Rock Against Racism before they moved in court for an injunction?

A. We had no meetings whatsoever.

(556) Q. Are you familiar with this court's 1986 decision relating to the use guidelines?

A. Yes, I am.

Q. Do you know whether the court upheld the insurance requirement in the use guidelines?

THE COURT: Oh, I don't need the witness' assistance on that. I wrote it myself.

Q. Did Rock Against Racism provide any insurance for their 1986 event?

A. No, they did not.

Q. Did the Department of Parks permit Rock Against Racism to hold their event even though they did not provide insurance?

A. Yes, we did.

Q. Let me direct your attention to the weeks preceding this trial in 1987.

THE COURT: Ms. Liberatore, permit me. I asked you yesterday evening how much more direct you thought you had with this witness and your estimate then was 20 minutes and I took certain actions in reliance on that. What do you now say?

MS. LIBERATORE: I am sorry, your Honor. I am not very good at estimating this type of thing at this point.

THE COURT: I impose no permit or regulation on (557) you, but I would like to know how much more time do you think you have with this witness.

MS. LIBERATORE: I would estimate at this point 25 minutes.

THE COURT: All right. We will take a recess at this point.

(Recess)

THE COURT: Counsel may continue.

BY MS. LIBERATORE:

Q. Let me direct your attention to the weeks preceding this trial. Did Rock Against Racism submit a special events application for use of Central Park?

A. Are we speaking 1986 or '87?

Q. 1987.

A. Rock Against Racism had not submitted an application until very recently.

Q. Do you know approximately when the special events application was received by you?

A. I believe it was within the last two to three weeks.

Q. Do you know what date they are requesting for the 1987 event, Rock Against Racism?

A. They are requesting Sunday, May 3 for use of the Central Park bandshell. However, if I might add, they have also submitted applications for the use of the Great Lawn (558) in Central Park for May 2 and also use of the Great Lawn on May 3, apparently at the same time as the proposed event at the bandshell.

Q. Before you received Rock Against Racism's application for this year had you received other applications for use of the bandshell for the weekends in May?

A. Yes, I had.

Q. Had you received enough applications prior to receipt of Rock Against Racism's application to take all available weekends in May?

A. Yes, I had.

Q. Could you have denied Rock Against Racism's application at that point, on the lack of available space?

A. Based on the lack of date, certainly.

Q. Did you do so?

A. No, I didn't.

Q. Why not?

A. Primarily because it—I am familiar with all events at the bandshell and there are two reasons. One, I had seen that they had actually listed the date of May 3 in a publication, which struck me as unusual, that they would be listing a date for a performance at the bandshell when they hadn't put in an application, but I made a note of that, and then also simply because Rock Against Racism (559) usually puts in an application well in advance. When I say well in advance, usually it's about twelve months in advance of their event. So it's very unusual that they hadn't submitted an application.

Q. Did you take any action regarding the date Rock Against Racism traditionally applies for in May before you actually received their application in 1987?

A. In my own calendar I gave them the benefit of the doubt and just kind of earmarked it, assuming that at some point they would put in an application and that they would be requesting a date. So I tried to reschedule everyone else around that possibility.

Q. Were you successful in rescheduling?

A. Yes.

Q. At this time have you reached the point in the application process with respect to Rock Against Racism's 1987 event to discuss details concerning that event with them?

A. I believe we're at that point now. They submitted that application and we have sent them—I sent them a letter essen-

tially stating that we would honor that date subject to their following our use guidelines, and I also under separate letter sent them a tech requirement form and also a supplementary permit application form.

Q. Have you received any of those, that tech form (560) or supplemental application form, back from Rock Against Racism as of this day?

A. As of today, I haven't.

Q. Would you need that information in order to discuss in more depth the planning for their event?

A. Yes. We need to know all kinds of things, about their cleanup, who is cleaning up, and also what tech requirements they have.

MS. LIBERATORE: I would like to have marked as Defendants' Exhibit I two letters, I 1 and I 2. I only have extra copies of one of the letters.

Q. Do you recognize those correspondence?

A. Yes, I do.

Q. Could you describe what the first letter says? First describe who it's addressed to.

A. The first letter is addressed to Mr. Bruno Walter, who had put in the permit this year for Rock Against Racism.

THE COURT: Is it Mr. Bruno Walter or Mr. Walter Bruno?

THE WITNESS: Excuse me.

MR. FOSBINDER: Bruno is the first name.

THE COURT: I was looking at the letter dated March 20, which says Mr. Walter Bruno.

THE WITNESS: Yes, I see the inconsistency there. (561) I am not sure of the individual.

THE COURT: Which exhibit are you looking at? Is it I 1 or I 2?

THE WITNESS: I'm looking at I believe it's 2.

MS. LIBERATORE: Your Honor, I believe that's I 1, and that's the one I don't have extra copies of.

THE COURT: All right. What is Exhibit I 1, Mr. Killian?

THE WITNESS: This is a letter under my signature to Mr. Walter stating that we have received his permit application for May 3, 1987 and that we have set the date aside, providing he meets the terms of the provisions and the use guidelines.

THE COURT: The exhibit should be in evidence before I consider its substance. Is the exhibit offered?

MS. LIBERATORE: Yes, your Honor.

THE COURT: Objection?

MR. FOSBINDER: No.

THE COURT: Received.

(Defendants' Exhibit I 1 for identification was received in evidence)

MS. LIBERATORE: I also offer the second letter, which is Defendants' Exhibit I 2.

THE COURT: Did you write that letter, sir?

THE WITNESS: The I 1, yes, I wrote it. However, (562) it was actually drafted—drafted by me, but I went through Sid Nowell, who is parks counsel, because I wanted to run it by Mr. Nowell—I knew we were going on trial. I wanted to make sure that he understood that we were honoring the date, and someone

from his office actually did the signature, because my office is on 104th Street and his is on 64th Street.

THE COURT: Insofar as you are aware, the letter was mailed out?

THE WITNESS: Yes, sir.

THE COURT: Is there objection to the offer?

MR. FOSBINDER: No, not at all.

THE COURT: Received.

(Defendants' Exhibit I 2 for identification was received in evidence)

BY MS. LIBERATORE:

Q. Could you describe the second letter?

A. The second letter is also to Mr. Walter, saying that we're going to send him a special event permit, a supplementary application, and also a technical requirement form. And I sent those out personally myself, so I know that.

MS. LIBERATORE: May I have a moment, your Honor?

THE COURT: Yes.

(Pause)

(563) Q. Mr. Killian, do you have an opinion with respect to the Rock Against Racism event that you attended in 1986?

THE COURT: An opinion in what respect?

Esthetic, acoustic, political, social, economic? What on earth does that mean?

MS. LIBERATORE: I will withdraw the question, your Honor.

THE COURT: Please do.

Q. Were you offended at all by the Rock Against Racism event?

A. No, not other than the volume level.

Q. Has Commissioner Stern ever indicated to you that the permit application for Rock Against Racism should be denied?

A. For '86 or '87, both?

Q. For either year.

A. I have never had communication from Commissioner Stern regarding either permit.

Q. Has Commissioner Stern ever become involved in the Rock Against Racism permit application process, to your knowledge?

A. To my experience, Commissioner Stern has never been involved in the Rock Against Racism permit.

MS. LIBERATORE: If I may have a moment, your Honor.

(564) THE COURT: Yes.

(Pause)

Q. Did Commissioner Stern provide you with any substantive changes with respect to the use guidelines at issue here?

A. Commissioner Stern's changes were primarily wording, some phrasing and grammatical changes.

Q. So nothing that goes to the substance of the regulations?

A. No.

Q. I want to go back to an earlier point. I want to clarify something. When you did a calculation concerning the amount of money the Department of Parks took in from private sponsors—

A. Yes.

Q. —based on their sound system fees—

A. Yes.

Q. —did you compare the amount of money the Department of Parks took in from those sponsors to the amount of money the Department of Parks paid New York Sound for those sponsored events?

A. Yes, I did. There was a loss on the part of the Department of Parks of a few hundred dollars.

Q. In those calculations were you considering any other events other than those provided by private sponsors (565) at the bandshell?

MR. FOSBINDER: Asked and answered.

THE COURT: Sustained. We have been through this.

MS. LIBERATORE: I was just trying to clarify the point.

THE COURT: I understand it clearly.

MS. LIBERATORE: Okay.

Q. Mr. Killian, to your knowledge, based on your experience in 1986, were the use guidelines ever enforced by the Department of Parks so as to exclude any private sponsors who wanted to use the bandshell area?

THE COURT: Hold on just a minute.

(Pause)

THE COURT: Go ahead.

MS. LIBERATORE: I would like to rephrase the question. I withdraw the former question.

Q. Mr.Killian, to your knowledge, and based on your experience with the 1986 season, were any of the provisions contained in the use guidelines ever applied by the Department of Parks in or-

der to exclude any private group that wanted to use the bandshell area?

MR. FOSBINDER: Asked and answered.

THE COURT: No, I will take it.

A. They were not used to exclude any group, to my (566) knowledge. Some groups chose other sites within the five boroughs. One particular promoter wanted a large festival in conjunction with an event he was doing at Madison Square Garden. He withdrew his application. A number of applications were simply withdrawn. For instance, a number of people file applications and for whatever reasons, they can't get the acts together or whatever, they cancel. But in strict use of the guidelines, with the exception of the one event I have spoken of, no one was denied use of the bandshell.

THE COURT: And what was the one event you spoke of?

THE WITNESS: There is a salsa promoter, Ralph Mercado, and he was doing an event at Madison Square Garden. He wanted it in conjunction with that event with a beer promoter. He asked me—he would have about 50,000 people. And we simply met with Mr. Mercado and we expressed to him our guidelines and our concern. He simply said "Well, that's what I thought you would say," and he withdrew his application. He wasn't interested in other sites. He just wanted a free festival to go with his Garden dates.

MS. LIBERATORE: No further questions, your Honor.

THE COURT: All right. Counsel for plaintiffs may inquire.

(567) MR. FOSBINDER: Thank you.

REDIRECT EXAMINATION

BY MR. FOSBINDER:

Q. Do you still have the two letters in front of you?

A. Yes, I do.

Q. Could you read the last paragraph of the longer of the two letters and identify what exhibit number that is?

A. I believe it's Exhibit 1 or I 1. The paragraph reads:

"Additionally, I have today under separate cover letter forwarded to you the department's technical information form and supplemental special event permit application."

Q. Maybe the second to last. I didn't have a copy.

A. This one or this one?

Q. Excuse me. Could you read the last sentence of the first paragraph?

A. It states "Please be advised that the date has been set aside for RAR and the bandshell will be made available to you provided that Rock Against Racism meets the terms and conditions set forth in the use guidelines for the Naumburg Bandshell."

Q. Is one of the use guidelines for the Naumburg Bandshell a requirement that all of the City of New York's (568) parks and recreation rules, which have been introduced as Defendants' Exhibit G, be followed?

A. In general practice, rules and regulations of the department may supersede in some cases the guidelines for the bandshell. The guidelines for the bandshell are an attempt to be site-specific for specific needs and issues there.

Q. I am going to give you a document and could you identify the document and then read section number 9, please.

THE COURT: Is it in evidence?

MR. FOSBINDER: It is, yes. Exhibit F?

THE WITNESS: It looks like G on here.

MS. LIBERATORE: G.

MR. FOSBINDER: That's Exhibit G.

A. You have circled section 9 regarding posting of notices, advertising and display, and this isn't numbered.

Q. Could you read it?

A. There are two sections, A and B. A states "No person shall post, paint, distribute, display, affix, construct or carry and placard, handbill, circular, flag, banner, sign, model or other item, nor display such items by means of aircraft, kite, balloon or other aerial device in, on or above the surface of any park for any purpose whatsoever, except as permitted by commissioner."

(569) Section B reads "No person shall play a musical instrument or drum or cause any noise for advertising or commercial purposes or for drawing attention to any display, exhibition or performance."

Q. Has that rule been withdrawn, to the best of your knowledge?

A. To my knowledge, I am not totally familiar with the rules and regs. However, that rule was withdrawn from the guidelines for the Naumburg Bandshell.

Q. That rule is in the process of being withdrawn, is that correct, from the Naumburg Bandshell regulations?

A. I have blanked out by marker on all Naumburg Bandshell that requirement.

Q. We're aware of that. The question is has it gone through the process necessary to officially withdraw it as a regulation as of this date.

A. I believe it's in process.

Q. Do you know that it's in process?

A. That's what I have been advised.

Q. Who advised you that?

A. Parks counsel.

Q. Did parks counsel advise you whether rule number 9 in the Parks Department regulations had been withdrawn?

A. I don't know if rule number 9 has been—or section 9, rather, has been withdrawn from the parks rules (570) and regulations. However,—

Q. That's all. Thank you. Could you explain to me a little bit more about who was involved in the creation of the Naumburg Bandshell regulations?

A. As I stated in my affidavit, I interviewed a number of people within the Department of Parks and also held a number of meetings, Kate Pearson being one person—she is director of special events—Michelle Shebanie—

Q. Kate Pearson, what is her—

A. The current director—actually, I believe she has the title chief of special events now.

Q. And she has been—

A. She has been in the department I believe since March of 1986.

Q. But she was involved in drafting these regualtions?

A. I did the original draft and circulated it throughout the department for criticism and suggestions.

Q. Was she involved in that process?

A. A copy was circulated to her.

Q. Did she make comments?

A. Kate Pearson's comment, she felt the cover page was a bit too wordy.

Q. She made comments about the regulations?

A. That was the only comment she made.

(571) Q. Okay. Thank you. Can you give me the names of other individuals who had a more significant role in addition to yourself in drafting these regulations?

A. Marie Ruby, who is my direct supervisor. She is the chief of visitor services for Central Park. Also Ron Cianciulli, who I believe has testified he is the chief of maintenance and operations for Central Park. Michelle Shebanie had some ideas, as did Sheldon Horowitz had some ideas.

I had a large meeting with Robert Russo, who is the deputy commissioner of the Parks Department. In attendance, Kate was there, also Sid Nowell, Marie Ruby and myself. Sid Nowell is parks counsel. He and I had a number of meetings and extensive contacts in drafting and redrafting.

I also had a meeting with the Manhattan borough commissioner, Patrick Pomposello, which Ron Cianciulli was there, I was there, Marie Ruby was there, I believe Sheldon Horowitz was also there, and we discussed the guidelines.

Q. I take it you have answered my question of some year ago, that you did consult with a lawyer in drafting these regulations, and what lawyer would that be?

A. I consulted with Sidney Nowell, who is parks counsel.

Q. And I will ask my other question. Have you read (572) the Constitution?

A. I have read the Constitution.

MR. PINES: Your Honor—

THE COURT: I will permit it. Your answer, sir, is?

A. I have read the Constitution.

THE COURT: Very good.

Q. At any point in these discussions while formulating the guidelines did the question of the constitutionality of any of these provisions come up?

A. The question of constitutionality was not discussed other than that parks counsel made suggestions and changes in wording and phrases.

Q. Were you informed at any point that the use of the bandshell was in litigation?

When did you first hear about the RAR lawsuit? I will put it that way.

A. Well, I had a whole file on Rock Against Racism. So I knew that Rock Against Racism had held the events at the bandshell. I did not understand it was, as you're suggesting, in litigation. I know that the department had settled on previous occasions with Rock Against Racism.

Q. No one informed you when you took your position with the city that rules and regulations regarding the Naumburg Bandshell were at that point in litigation?

(573) A. I created the rules and regulations for the Naumburg Bandshell. How could they inform me that they were in litigation? I wrote them after I took the position.

Q. As I understand, you created the Naumburg—

A. The use guidelines for the Naumburg Bandshell in Central Park.

Q. But other rules and regulations that previously regulated behavior or activity at the bandshell existed, right?

A. Well, there were the parks rules and regs, yes.

Q. And your testimony is that no one in the Parks Department informed you that any of those rules or regulations had been challenged or were currently being challenged at the time you were hired?

MS. LIBERATORE: Your Honor, I would object as being irrelevant.

THE COURT: It may have to do with the manner in which these regulations came to be crafted. Of course, I must say, it seems to me that what the regulations say is the single most important issue on the constitutionality of what they say. But I will permit the witness to answer.

A. I had known that the department had been previously in court with Rock Against Racism. However, I didn't know of litigation that was going on when I was hired.

(574) Q. When did you find out?

A. Excuse me?

Q. When did you find out that there was litigation regarding the use of the bandshell currently in process?

A. I'm afraid perhaps I don't understand the legal system, because as I understood it, the previous claims had been settled and events had gone on, and I was drafting guidelines based on broad and general use of the bandshell by many, many different groups. I looked at Rock Against Racism's file but I also looked at many, many other files from other groups who were using the facility in drafting the guidelines.

Q. At any point did you have a contact with Mr. Chad Vignola?

A. I had contact—

MS. LIBERATORE: Your Honor, I would object to this question. Any contact or conversations he had with Chad Vignola, who was the attorney for the Corporation Counsel's office on this case, would be privileged as attorney-client privilege.

MR. FOSBINDER: I wasn't asking the content of those conversations.

THE COURT: You wish to establish simply whether or not he spoke to him?

Did you speak to him?

(575) THE WITNESS: I spoke to Chad Vignola, but it was—

THE COURT: That's all you need say.

Q. You testified that in drafting these regulations one of your concerns was a perceived problem of the quality of sound amplification at the bandshell. Can you identify any individual who told you about this problem at this point?

A. I couldn't identify one individual, no.

Q. In your consultations with Mr. Floyd, who you retained regarding sound systems for the bandshell—

A. Yes, sir.

Q. —were there any measures suggested other than raising the speakers so that they could be pointed down more at the audience—

A. Well, again—

Q. —to prevent the spread of sound.

A. Again, in general, prior to contracting with Mr. Floyd, we had discussed the idea of setting a decibel level. However, that seemed to prove impossible both to set and to agree upon.

Q. Why did that seem to prove impossible?

A. Well, according to both consultation with Mr. Floyd and also representatives of the Department of Environmental Protection, it seems that on a given day (576) weather conditions, tree foliage, how the sound bounces, how many bodies you have in a crowd absorbing the sound, are going to make it difficult to set one standard, you know, one standard that says from now on the decibel level is 75.

Q. Why does that make it difficult?

A. It makes it difficult because you're going to have to perhaps adjust the agreed-upon decibel level, either lower it or raise it.

Q. Why are you going to have to adjust it?

A. It totally depends on how the sound is on that particular day at that particular event. The way sound bounces, the way it moves around, is different at each event, and to set a specific level seemed impossible based on discussions with Mr. Floyd and also with the Department of Environmental Protection.

Q. You have said this repeatedly and I am at a loss. What precisely would be the problem based on what you were told by the consultants you hired with setting a decibel level of say, just for instance, 100 at the back of the bandshell area?

A. There seemed to be, to the best of my recollection, problems with the way sound is absorbed and bounces.

Q. Absorbed by what?

(577) A. Bodies, so if you have a large crowd—

Q. What would that have to do with the back of the audience?

A. If you're setting a decibel level, and in any decibel level there is probably going to be a range on either side, it's not going to be a consistent number—

Q. I'm sorry. What do you mean by that?

MS. LIBERATORE: Your Honor, I would object to this line of testimony. Mr. Killian has not asserted that he is an expert on the way sound operates in an outside environment. I don't think he is competent to testify—

THE COURT: But a great deal of evidence has been elicited from him as to his consultations with the expert and what he did in response to what the expert told him. I will permit the inquiry.

Whenever the witness is asked a question which he feels he lacks the expertise to answer presumably he will say so. But I think what counsel is focusing on, Mr. Killian, is what you were advised by your own expert advisor, to the extent that you can understand it and recall it.

A. To that extent, both the Department of Environmental Protection and Gary Floyd advised against trying to set one decibel level.

Q. What did they say the bad result of setting one (578) decibel level would be?

MS. LIBERATORE: Your Honor, I would object to the form of the question, bad result.

THE COURT: Rephrase it.

Q. Why did they say that one decibel level would not meet your needs?

A. To the best of my recollection, they felt that there were a number of other factors that affect determining what a decibel level is and that they could not state clearly what a decibel level should be at the bandshell.

Q. Could you tell me what you told the experts the problem was?

A. Well, I believe that the Department of Environmental Protection had been at previous events and had done measurements, events at the bandshell.

Q. What was the problem that you told Mr. Floyd you had that he had to solve?

A. I told Mr. Floyd we had a couple of problems. One problem was sound that was bleeding into other areas of the park. Another problem was groups that would be using inadequate systems for the bandshell. I requested that he look into sound vendors that could provide us with a quality sound system.

Q. Let's go back to one of these points, inadequate (579) sound system. Could you give me an example of an inadequate sound system that was used at the Bandshell that caused problems that you actually know of?

A. That I have—

Q. That you have firsthand knowledge of?

A. No, sir.

Q. Could you give me the name of any individual who told you that there was a problem specifically with inadequate sound system at the bandshell?

MS. LIBERATORE: Your Honor, I would say that that has been asked and answered.

THE COURT: I will permit it. You may answer.

A. I cannot state an individual, no.

Q. When you discussed with your acoustics expert the problem of the spread of sound did you discuss the fact that content might affect people's perception of loudness?

A. I did not discuss content at all. My contracting with Mr. Floyd and also with contacts with the Department of Environ-

mental Protection, it was clear to me that we were going to have a variety of musical events, from rock to jazz to minimalist, and that the system that is created should reflect the diversity.

Q. At any point in your discussions with the acoustics consultants you retained did you request any measurement or were you aware of any measurements that you (580) used in formulating the plan for a sound system, measurement of decibel levels at either the Grand Opera or the symphony events?

A. We don't have any symphony events at the bandshell.

Q. In Central Park, were you aware of any decibel levels or any measurements that were taken?

A. At the bandshell?

Q. Let's say the bandshell.

A. In 1986 I requested that the Department of Environmental Protection measure sound levels at a series of concerts. One concert was Rock Against Racism, one was San Juan Fiesta, one was Puerto Rican Folklorica. I requested others, but due to their manpower they turned down those requests. I believe Mr. Floyd also took some measurements, though—that's my knowledge.

Q. Did you at any point get any sort of a sense of what the decibel level might be in the audience at the Grand Opera?

A. For the Grand Opera?

MS. LIBERATORE: Your Honor, I would object to the form.

THE COURT: Sustained.

Q. Have you been informed by any of the acoustics experts you retained what sort of decibel level might be (581) necessary for quality sound reproduction at the bandshell site?

A. The decibel number? No, sir.

Q. Okay. Would it be a fair characterization to say that one of the main reasons for instituting the city-selected sound system was so that the city could control the volume at the bandshell?

A. The Department of Parks, as I have stated previously, sought to contain sound levels to the general concert ground area.

Q. Could you answer that question with a yes or no?

THE COURT: Read the question back.

Listen to it, Mr. Killian. See if you can answer it yes or no. If you cannot, say so.

(Question read)

A. Yes, and I would qualify it as I have previously.

THE COURT: It sounds like you're saying yes with an explanation.

THE WITNESS: That's correct.

THE COURT: Give me the explanation.

THE WITNESS: The explanation is we wanted to contain it to that area, and I think that's important, because we are not implying control over content or quality.

Q. Isn't it true that to the best of your knowledge nothing can be done in terms of mixing the sound to affect (582) the spread of the sound?

A. I am not an expert. I would disagree with that though.

Q. Can you tell me who told you what to the contrary?

A. Well, I can primarily just speak from my experience, that certain instruments, specifically, bass and drums, especially an electric bass, tend to carry quite a bit stronger outside, for whatever reasons, and I don't know the reasons, the sound tends to

travel significantly further than other instruments. In a mix at a board you can contain that, you can control that, so there is still an adequate mix both on the stage and for the audience but that doesn't bleed to other areas of the park.

Q. Won't that have the effect of substantially changing the sound and the quality that the audience hears?

MS. LIBERATORE: Your Honor, I would object to the form.

THE COURT: If the witness has a view on it he may express it. And that will have to be the last question. I must now interrupt this to deal with a matter which I thought I would be dealing with earlier. This will be the last question on this case, which will then be adjourned until 2 o'clock.

In case you have forgotten the question, Mr. (583) Killian, I will ask the reporter to read it back, and see if you have any comment to make.

(Question read)

A. To my experience, that would not significantly alter the quality of sound the audience hears.

THE COURT: This case is continued till 2 o'clock. Clean up the area as quickly as you can.

(Luncheon recess)

(584) **AFTERNOON SESSION**

2:15 p.m.

JOSEPH KILLIAN resumed.

THE COURT: Do you recall the oath that you were sworn previously?

THE WITNESS: I do.

THE COURT: It is still in force. Which is to say you are still under oath. All right?

THE WITNESS: Okay.

THE COURT: Proceed.

REDIRECT EXAMINATION CONTINUED

BY MR. FOSBINDER:

Q. I would like to begin by asking you whether you contemplated any less drastic means for reducing the spread of sound. Specifically, did you consider asking Rock Against Racism to tilt their speakers downward, as New York Sound did?

A. New York Sound did not tilt their speakers downward. The suggestion that I offered in previous testimony was a suggestion by Gary Floyd to raise speakers up, tilt them down, so that it would bounce. That was one idea, and I believe that I testified that the cost was prohibitive for that to be done.

Q. Were any suggestions made to Rock Against Racism by you or anyone else that you are aware of on any method (585) reducing the spread of sound for the 1986 event?

A. Not to my knowledge.

Q. Now, if we could go back to the question of the guidelines for a moment and the rules, what power do you perceive that you have to punish people who violate the rules?

A. Are you speaking to me personally, the department—

Q. You personally.

A. There are limited powers, and only within consultation with other groups. For instance, as an example, should someone not clean up the area, with discussion and consultation with Ron Cianciulli, director of maintenance and operations, a portion of the cleanup bond could be withheld. That's certainly one power.

Upon consultation and direction within an operating meeting, I imagine we could deny groups permits for future seasons. But that is only—not myself solely, I couldn't make that decision alone.

Q. Who could make the decision to deny sponsors or major responsible parties any and all future bandshell permit applications?

A. Essentially, I make those in discussion with the operations meeting. When we have meetings we discuss things and we discuss shall this be denied or shall it be (586) approved.

Q. Are there any procedures that you would follow in making this determination?

A. The procedures are if an application is excessive we contact the sponsor and we attempt to negotiate on those grounds, that it's excessive.

THE COURT: Excessive in what way?

THE WITNESS: Perhaps it may be in the number of hours they wish to use the facility or something to that effect or perhaps if they can't supply the number of bathrooms required or something like that. We attempt to negotiate with them. If after negotiation it seems that there is an impasse, then we go to an operations meeting and discuss it.

Q. Okay. Let me give you this document, which is Defendants' Exhibit F. Could you read the paragraph that I have marked?

A. "Failure to follow these guidelines as proven by evaluation and documentation can result in forfeiture of bond and provide reason to deny the sponsor or major responsible parties any and all future bandshell permit applications."

Q. Can you tell me how you determine who is a major participant?

A. I think we would go by the names on the previous (587) permit. Those are the only guideline that we have, in addition to our supplementary form, the names that are listed on there.

Q. Can you tell me specifically how this evaluation procedure would work or does work?

A. On the evaluation, especially after large events—it depends on the size of the event. But say the Urban Park Service was involved in the event. Usually they will write up a report, usually I will write up a report, perhaps there are photographs, perhaps there are letters that we have received, perhaps there is a videotape made, and then we evaluate those. However, that's not the case—it's extremely rare, these kind of cases.

Q. Has the city's Park Department, to your knowledge, ever told anyone who put on an event in Central Park that they would in the future not be granted any permits because they had violated the rules?

A. I can only speak about the Central Park bandshell and my experience there last year. That has never happened. I cannot speak for the entire Parks Department.

Q. If it were to happen, would the people who we alleged to have been responsible for breaking the rules have any right to appear before the people who would make the determination that future permit would be denied?

(588) MS. LIBERATORE: Your Honor, I would object to this entire line of questioning. This is not one of the provisions that the plaintiffs have challenged either in the amended complaint or in their conclusions of law. I submit that therefore any of this testimony is irrelevant.

THE COURT: Yes. I will sustain the objection to the line of inquiry.

Q. Let's go to the question of complaints.

MR. FOSBINDER: Do we have extra copies of Plaintiff's Exhibit—whatever the letters are.

Q. What exhibit is that?

MS. LIBERATORE: Let me just get the one that's marked.

Q. You have identified these as complaints received about RAR event, is that correct?

A. That's correct.

Q. How many are there?

A. Four written complaints.

Q. Referring to the fourth complaint from Isaac Asimov, do you perceive that to be a complaint about RAR specifically or a complaint about loud music coming from the bandshell every Saturday and Sunday afternoon?

A. I can say that this was written on the date of Rock Against Racism's event in 1986. I can also say that there obviously is a concern about sound levels coming from (589) the bandshell on Saturday and Sunday afternoons.

Q. With regard to the complaint, the third in the series, from Janet Jeppson, would you read the first paragraph?

A. "I appreciate your efforts to curb the excessive noise made by private groups who play amplified music in the park. I'm terribly distressed that Judge Haight sees fit to allow people to make as much noise as they wish."

Q. Is that a fair characterization of your efforts, Mr. Killian?

MS. LIBERATORE: Your Honor, I would object to that.

THE COURT: Yes. Sustained. I don't think this can be binding on the witness in any way.

MR. FOSBINDER: I would essentially be asking the same question about the second one, which states, from Florence B.

Friedman, "I understand that you have been trying to limit the use of the bandshell in Central Park and have put the rock bands and similar events off limits."

Given the fact that two out of the four complaints have almost identical perceptions of what Mr. Killian has been trying to do, I would appreciate some leeway in—

THE COURT: My only point, Mr. Fosbinder, was that this witness is neither privy to nor bound by the (590) mental perceptions of these correspondents. But having said that much, I will let you inquire.

Q. Did you have personal contact in terms of telephone calls with either of these individuals prior to the letters? Had you talked to either of these people prior to the letters being written, to the best of your knowledge?

A. To the best of my knowledge, I have not.

Q. So you have no explanation as to why Mrs. Friedman would have the perception that you were trying to limit the use of the bandshell?

A. That's correct.

Q. Could you give me some idea of what your relationship with New York Sound Company is in terms of who makes the decision to turn the volume up or down?

A. My relationship with New York Sound is such that for privately sponsored events, when there are public groups using the facility, most of them choose to appoint a representative who will be at the board and suggesting the mix and music characteristics to New York Sound. The extent—I can make suggestions to New York Sound as to loudness or as to softness, but in general it's deferred to the sponsoring group.

Q. Let me attempt to make this clearer. If Rock Against Racism were to be using the New York Sound system (591) and Rock

Against Racism's appointed representative said "Turn it up" and you said "Turn it down," what is your understanding of what would happen?

A. You're speculating on something that hasn't happened, but if such was the case I think I would walk the representative around the—again, the perimeter, the dead road, Bethesda Terrace, other areas on the outside of the concert ground, and clearly I think we could come to a reasonable decision whether it was too loud at that point. However, on the concert ground itself, I think the representative from Rock Against Racism would have total influence upon whoever is at the mixing board.

Q. What if you still disagreed after taking your hike about whether or not it should be turned up or turned down?

MS. LIBERATORE: Your Honor, I would object to the question as speculative.

THE COURT: Well, no, I think it's useful to help me understand exactly how this witness feels the operations of the guidelines function. I appreciate the witness says it hasn't happened yet, but that doesn't mean it won't in future, and we're dealing in part with what might occur in future. I think it's a proper question.

Do you remember what it is now, Mr. Killian, after all that?

(592) THE WITNESS: Yes, I believe I do.

THE COURT: All right.

A. In that case—and again, I am just guessing on my experience there—it's a subjective call. We're out there together. In fact—

Q. Who decides?

A. In fact, I may defer to them, as I have in the past for other groups. For instance, as I have stated previously, for the New York Grand Opera, I felt it was too soft, especially in the back. I

don't feel people could hear it. However, again, I deferred to them. Perhaps in this situation with Rock Against Racism I would also defer to them.

It's a judgment call on that day when you're out there. There are a lot of factors involved, including how many people are listening to it, at what placement they are listening to it. I don't think I can say clearly that if we're standing at the dead road and a representative of RAR and myself have a disagreement that I am going to run immediately to the mixing board and request them to turn it down. I don't think, especially in a situation where an event is under way, where you have a large audience there, I don't think you can made a rash decision based on a subjective call out there. I think you have to be very sensitive to that.

When events have begun, when they are started, there is not a whole lot we can do as parks officials to control or contain it. If—there are just too many qualities that go on out there when you're in the field that you don't want to create a disturbance and often is the case where you simply defer and you say, well, okay, we'll have to let this one go.

Q. If we could turn to the question of the $100 per hour fee for use of the sound system-

THE COURT: Before we come to that, one more question on that last subject. Correct me if I am wrong, Mr. Killian. In the event of just a plain disagreement with the sponsor, you are out on the perimeter, the dead road, and after listening with proper deference to the sponsor's representative you simply feel it's too loud, it's a lot too loud, and you fail in your effort to persuade the representative that that is so, under these guidelines, have you the authority, if you wish to exercise it, to require and direct that the sound be turned down by the New York Sound technician?

THE WITNESS: Ultimately, we—we, myself and parks representatives—have that authority. However, it can only be used I

think in extreme circumstances, when you, again, sense what the crowd is.

For instance, if you are receiving a tremendous (594) tumult of complaints, of people who want it turned down, I think then yes, you go ahead with that. However, if there is a crowd assembled, they are enjoying this music, if your turning it down would upset that crowd, would disturb that crowd, I think you have to be very, very careful with your judgment at that point.

Ultimately, I can make that decision. However, when the event is in progress its a very careful decision and it is not one that you simply jump into. There are too many factors that can backfire on you with a public crowd.

Q. With regard to the fee charged for use of the sound system, you testified that the charges were based on a daily basis from New York Sound, is that correct?

A. We were given an overall bid for a season of 50 shows, which broke down on a daily basis to a figure of $400 as cost to the Parks Department.

Q. Can you tell me based on your survey of sound system companies whether or not someone wishing to put on a one-hour event at the bandshell independently of the New York Sound system, independently of the system provided, would be able to find a system of that quality for $200?

A. I would have to know the nature of the event. I think for what New York Sound—

Q. I am asking about the nature of the sound system. The same quality sound system, somebody wants to put on a (595) one-hour event. Based on your survey, could you find a company with equipment of that quality who would be willing to truck it all to Central Park, set it up, operate it for one hour, break it down and truck it away, for what I recall to be a one-hour performance time plus the set up time allowance, which I think would be—

A. Yes, that's correct. That would be $200.

Q. Based on your survey, would it be possible—

A. And that's what we would charge a park user.

Q. I understand that's what you would charge. I am asking you whether someone who wanted to do that, put on a one-hour event on their own, would be able to find such a sound system for that price.

A. In all of our bid procedures we were basing it on 50 shows. The price reduction and the range that we were given was based on 50 shows. My discussions further with these sound companies is that it would be substantially more, three and four times as much, were they to only do a one-time only event. Now, that is not to say—

Q. That's the—

THE COURT: Let him finish.

MR. FOSBINDER: Okay.

A. That is not to say that there is not some sound company in New York City who perhaps you could get it do it for that fee. My caution would be we wanted to employ a (596) firm that was familiar with that site, familiar with the electricity, familiar with the amplification needs.

Many sound companies are simply a technician and their van, and you may be able to find someone, but I don't think you can find someone who could come out with that professional experience, with that inventory of equipment, with a rain date policy and with a familiarity with that facility for that price.

Q. Alternatively, a group wishing to put on an event of say eight hours plus setup and breakdown time, based upon your survey would they have any difficulty in finding a sound company to do that independently at a cost of approximately $900?

MS. LIBERATORE: Your honor, I would object to the question. I don't think it's at all relevant what the market rate is. I think that's what he is trying to get at.

THE COURT: No, I think it's relevant. If the witness knows he can answer.

A. I think I can answer you best by example. San Juan Fiesta each year has put on a large Hispanic festival at the bandshell. When they heard about our guidelines and our sound requirements, needless to say, they were very concerned. However, we approached them. They were, to put it mildly, elated at the fee. The fee for them, for a festival, a day-long event, was substantially lower than (597) they had previously been paying to outside vendors.

Puerto Rican Folklorica, which is in August of each year, had a similar experience. They were concerned about using the system. They came to San Juan Fiesta, they saw the system, and it was much cheaper, by their accounts to me, than they would have gotten for a festival day-long event.

The case was also true for the New York Grand Opera. It was a substantial reduction in fee for them also.

Q. Would it then be fair to say that, to the best of your knowledge, every group that uses amplified sound at the bandshell stands to come out ahead financially except Rock Against Racism?

MS. LIBERATORE: Your Honor, I would object.

THE COURT: Overruled. If the witness has a basis for answering, he may.

A. I don't really know if they would come out financially ahead. I am not guaranteeing this as a method. They may. They certainly may not. Many groups benefited from our bulk rate, if you will, cost. By booking 50 shows we received a much better rate than they will on a one-time only event. However, I cannot say I

guarantee you a price reduction here and you're going to save so much by doing your event with our sound system. That may not be the case.

Q. Would it be fair to say that RAR, which you know (598) owns its own equipment or provides its own equipment, is the only group that you know of that stands to spend more money on sound at the bandshell?

MS. LIBERATORE: Your Honor, I would object to the form of the question. It's not been established that Mr. Killian knows anything about who owns the sound system used by RAR.

THE COURT: I am sure the witness understands that he may answer only on the basis of his own knowledge. If he does not know he need only say so.

THE WITNESS: May I have the question repeated?

THE COURT: Read it back.

MR. FOSBINDER: I can rephrase it to eliminate that objection.

THE COURT: You may ask the witness to assume certain things.

Q. Assuming that RAR owns its own system, is RAR the only group that you know of that used the bandshell last year that would have stood to pay more money because of the new regulation for sound?

A. I would point to the example of Theatre For A New City. They own their own sound system and again I believe the fee was waived because they did it on a date when we had another event. If a group simply comes down to a situation where financially it is going to be difficult, (599) if not impossible, then I think we have to negotiate that, and I think we negotiate a reduced fee or we negotiate a waiver of the fee, whatever the particulars may be.

Q. What standard of proof do you use to determine whether or not a group can afford a fee?

A. The only standard of proof we have is the group's representatives and their honesty. Certainly many groups could come before us and say "We don't have the money." I think we would have to negotiate, and if that were the case, then we would have to waive the fee.

But we don't have a rigorous system of checking bank accounts or anything like that. As in the application, we can only go by the suggestions of the representatives of the group, what their idea of the event is and certainly of what their idea of their financial situation is.

Q. Let me give you another hypothetical to try to understand better the limitations. If someone comes to you and says "I want to put on an event for 3000 people at the bandshell and I've got a ton of money, I want the very, very, very best sound system available and I want the very, very, very best operator for that sound system," would there be any opportunity for them to provide their own operator or additional equipment?

A. They would—again, we would sit down in negotiation and discuss that. I can give you an example. (600) When you suggest additional equipment, for the New York Grand Opera, they particularly like a microphone called a PZM microphone, which is a plexiglas microphone which sits on the stage and is developed for theatrical use. It's a microphone that costs near $2000 each. Very, very few sound companies own it. They usually rent it out from a larger firm. They requested four of those. Our sound firm does not own those, New York Sound does not own PZM's.

We sat down with Vincent LaSelva, who is the director of the Grand Opera, and he requested this type of microphone because it is sensitive to the voice, sensitive to theatrical work, rather than big boom overheads, and New York Sound costed out what additional cost that would be. We discussed it with Vincent LaSelva. Mr. LaSelva was very willing to pay the extra fee for the rental of

this equipment because it was a specific item and in fact we did add that to the inventory for the opera's evenings.

That's a case where—you know, there are some instruments where you may want a very special or, as you say, the best microphone. Some microphones are geared toward horns, some are toward voice, some are toward percussive instruments. I think if a sponsor wants to bring in a piece of equipment like that, specific to their needs, if we can negotiate with the sound company and the sound company can patch it into their system, we're obliged (601) to do that.

Other than that, though, the sponsor is still required to use our sound vendor and our sound vendor's essential unit.

Q. I guess I am still unclear as to the answer to my basic question, which is if somebody said "These speakers are junk, these amplifiers are junk, I want something that costs five times as much, five times as good as far as I am concerned, the producer you got for the event is junk, I'm going to have a guy who does Frank Sinatra when he appears in Vegas, I am going to do everything, the best that can possibly be done," can you do that?

MS. LIBERATORE: Your Honor, I object to the form of the question.

THE COURT: No, I will take it.

MS. LIBERATORE: It's irrelevant.

THE COURT: No, I don't think so. I will take the answer.

A. I think at this point it's very speculative. This situation has not arisen. However, I would present the sponsor, as I always do, with an inventory of equipment. I have not heard a sponsor say "Well, this is junk, this amplifier is junk, these speakers are junk." In fact, the turbo sound speakers that we used last year are current (602) state of the art. However, if someone did say that, I think we stand by the fact that it is a requirement to use our system. However, the consideration is given that at this point we

have a very, very good track record with groups and with groups using it.

THE COURT: With respect, Mr. Killian, that's really going beyond the scope of counsel's question. I understand your testimony to be that with the exception of such patching in of additional special mikes as New York Sound might be able to do to satisfy someone like Maestro LaSelva, you would insist upon the basic sound system supplied by your vendors being used at the bandshell, true?

THE WITNESS: True.

THE COURT: All right. Now, how about the second half of Mr. Fosbinder's question, and that is the sound engineer. Suppose the sponsor says "Well, all right, I will leave all my stuff that I really prefer at home, but we do really feel very strongly about having our own sound engineer, who has been with this group since it was founded, being the man in charge at the soundboard. So we do ask that you let our sound man, after familiarizing himself with the machinery, be in charge of the soundboard." Would you let him do that?

THE WITNESS: Again, every company has a representative at that board, and in fact it works best, (603) not necessarily for the mix, but specifically if they are using tapes for cues. So like if a dancer comes out on stage, their sound man is the best person to push the button that the tape goes on because they know the exact moment, not our sound people to push that particular button, because they haven't seen the performance. However, the actual mix is still our vendor is at that board because that board is owned by that sound company and that person is most familiar with that board. But absolutely, a representative should be at the board to represent the best interests of that performing arts group.

THE COURT: I don't think that's quite what I asked. Suppose the sponsor said "We want only our people there at the

soundboard, in sole and exclusive control of the knobs and the dials. We don't want a New York Sound technician there at all. We will use that equipment, but the only engineers we want up there during the performance are our own sound technicians."

That's your question, isn't it, Mr. Fosbinder?

MR. FOSBINDER: Yes.

THE COURT: Would you permit that?

THE WITNESS: I hate to say it, your Honor, but—

THE COURT: Tell me the truth.

THE WITNESS: In that case the vendor—the question is would the vendor permit it. If they have (604) invested $50,000 in equipment they are very reluctant to let anyone else near their board.

We don't own the equipment. We're contracting with them. We're not renting equipment. We're renting it with technicians. Whether you can get a sound company to agree with that, that's a pretty tough bargain. You may, you may not.

THE COURT: Would you be inclined to ask them?

THE WITNESS: I would be inclined to ask them, certainly. But again, they own that equipment. It is their insurance on the equipment, it is their liability on that insurance.

THE COURT: All right. Thank you.

BY MR. FOSBINDER:

Q. With regard to the question of hooking up to electricity, are you familiar with all of the equipment RAR uses in terms of its fusing mechanisms?

A. I am not familiar with it.

Q. Are you trained in the field of electronics in any way?

A. I have extensive experience in electronics. However, I am not trained in that field.

Q. Was RAR asked to change the way they hooked up the electricity?

A. The event had started. I saw no reason to (605) disrupt the event to change connections. However, I monitored it backstage, and that was the extent of that.

Q. With regard to vehicles, RAR has testified that a significant difficulty arises in identifying precisely what vehicles will be used on the day of the event. Could you explain to me why you can't issue a certain number of permits without the vehicle ID number and license number?

A. I would first like to acknowledge—

MS. LIBERATORE: Your Honor, I think I would object. I also believe that this is not within the scope of the plaintiff's pleadings. I don't think they are challenging the vehicle permit question. I may be incorrect on that, but I don't believe that that is among their challenges.

THE COURT: Perhaps. But counsel for the city elicited a good deal of testimony about vehicles. So if the door was not opened before, it's open now. The witness may answer.

A. I would first like to acknowledge that most groups have similar problems. Most groups request blank vehicle permits. "Hey, just gave me six or ten and I'll take care of it."

In fact, we need that information on our books in case an occasion arises where there is a problem, where there is an injury, where there is an accident. A case in (606) point is in previous what I had been told, and I also found it true this year, I would give a permit to someone, they might whiteout their name, xerox it, and all of a sudden we had three or four vehicles that were not permitted there.

We're very concerned about vehicles in the park on weekends due to pedestrian traffic. So we require—

Q. How do you deal with the problem that you just identified in your permit system of people whiting out portions of the permit and duplicating it?

A. At that point, once someone has duplicated a permit, there is not a whole lot we can do. We also now put permits on stationary with the green maple leaf, so if they are xeroxed or copied you would get a darkened maple leaf rather than a green one.

The concern of ours, we don't have rangers or police officers at every single gate on weekends. So it's very difficult to police that. We're trying to collect the information in case there is an accident, so that we're responsible, so that if something happens we can identify what vehicle was out there, what the color was, who the owner was. That's the extent of it.

And in most cases, yes, people have problems, and in most cases we grant them the permits late, it could be a Friday, it could be late in the situation till they have all the information collected.

(607) In certain cases, I should point out, where there have been festivals and they can't collect all this information, groups prefer to have a shuttle vehicle between either Central Park West or Fifth Avenue that goes out, it picks up the bands, it brings them in, it takes them out again. So we have only given out one permit that simply shuttles the groups back and forth between the perimeter of the park and the bandshell. To me this is a very safe way of doing it, rather than continuing to bring in multiples of vehicles. Then you only have to identify one vehicle and one driver, one owner, et cetera.

Q. In terms of safety for the users of Central Park, would it be better to have equipment brought in at 6 o'clock in the morning on a Sunday in May or 10 o'clock in the morning on a Sunday in May?

A. That kind of decision would depend on factors of are there other events—I would have to consult Bill Dalton or a representative from his office as to where events are, can we cut through. Generally it's much better, since I have somebody, usually myself, managing the site, it's much better to have them come in prior to the event, two hours before, the 10 a.m. time. That way it's clean setup and it's just much easier.

Q. I don't think that was responsive to the question. I am puzzled. You're trying to reduce the (608) danger of setup vehicles interfering with pedestrian or bicycle traffic in Central Park. Based on your familiarity with the park, and having been there, as you stated, for practically every event, are there more people riding bicycles and running in Central Park and walking in Central Park at 10 a.m. on Sunday morning or at 6 a.m. on Sunday morning?

A. There are certainly more people. However, I think the thing you have to acknowledge is you need someone to manage that group from 6 a.m. on. Usually they want access to the facility, they want access to electricity, and for management purposes it's often better to have them there at 10 a.m.

Q. Can we talk a little bit about the rule regarding no amplified sound till noon on Sunday?

A. Yes.

Q. Have you had a number of applications from religious groups wishing to conduct events on Sunday morning?

A. 1986?

Q. Yes.

A. 1987?

MS. LIBERATORE: Your Honor, I would object on the ground of relevance.

THE COURT: The difficulty is that all of these (609) regulations the witness was taken by the hand through during questioning by the city, and so I am bound to permit some cross-examination, which I do. Counsel may inquire.

A. May I have the question repeated?

THE COURT: Read it back.

(Record read)

MS. LIBERATORE: Your Honor, I might also point out that I believe Mr. Fosbinder is incorrectly stating what the regulation provides. If he could perhaps recast in terms of what the regulation is or refer the witness to the regulation.

THE COURT: Let's get the regulation before the witness.

MR. FOSBINDER: Is this Exhibit F?

MS. LIBERATORE: Yes, it is.

Q. Would you read into the record what the regulations are with regard to Sunday morning?

A. I am afraid I don't find anything in here regarding Sunday mornings.

MS. LIBERATORE: There is nothing in there about Sunday morning. Take a look at the regulation.

MR. FOSBINDER: All right.

Q. There is nothing in those regulations about Sunday morning, is that correct?

A. To the best of my knowledge, that's correct.

(610) Q. Did I mishear something earlier? Didn't you say that sound amplification wasn't allowed before noon on Sunday?

A. May I read from the regulations?

Q. Sure.

A. "In deference to nearby residential neighbors and park users who enjoy quiet mornings, sound amplification is permitted

only after 12 p.m." It continues: "This may be waived in certain cases of children's theatre and acoustic music."

Q. So it's 12 o'clock every day?

A. Correct.

Q. Can you tell me what the standards are for determining whether or not that could be waived? Can you enumerate anything beyond what it says there or is that it?

MS. LIBERATORE: Your Honor. I would object again on the grounds of relevance.

THE COURT: Was this covered on defense counsel's questioning? I remember the vehicles were.

MR. FOSBINDER: Yes. The hours thing was brought up by the city, as I recall.

THE COURT: I think so. I will permit it.

MR. FOSBINDER: Otherwise I wouldn't have thought of it.

THE COURT: I will permit it.

(611) A. Again, I'm sorry, I need the question restated.

Q. I will restate it. Can you tell me what circumstances you can imagine where that requirement that sound amplification not be used until noon might be waived?

MS. LIBERATORE: Your Honor, I would object to the form of the question.

THE COURT: No. The witness may answer.

A. I'm speculating because I—certainly that can be waived. However, I am not certain of circumstances. For instance, if a group had to start at noon on the dot and they wanted to sound check prior to that, I am sure we would waive some time so they can do a sound check prior to noon. Now, that may be 11:45,

11:30, something like that, so that they can be ready to go at noon. I am not certain of other situations or circumstances.

THE COURT: What did you have in mind when you drafted, if you did draft, this sentence: "This may be waived in certain cases of children's theatre and acoustic music." What does that mean?

THE WITNESS: For instance, some groups arrive and they are setting up in the morning, perhaps from 10 o'clock to 12 o'clock, and they have their field of workers out there.

A case in point is San Juan Fiesta. They would like to provide music for their workers who are setting up (612) the barriers, the benches, so on and so forth, like that. Their concern is not to have their event start then but rather as their people are doing this work to have a bit of entertainment, and generally it's acoustic and unamplified, and I don't think we see anything wrong with that, as the group is setting up, if they want to put on a tape while people are preparing. It makes sense. However, their event isn't starting at that time. It's a setup time for them.

THE COURT: What does acoustic music mean in this context, unamplified music?

THE WITNESS: That's correct, yes.

THE COURT: That's what you meant when you wrote the phrase acoustic music?

THE WITNESS: That's correct.

THE COURT: Okay fine.

BY MR. FOSBINDER:

Q. Does this mean that you can amplify unamplified music before noon? That what it seems to mean.

THE COURT: Then it becomes amplified music.

A. That's correct. I must admit, I am confused. However, I feel that we need a bit of latitude. When a group has say 50 or 75 people setting something up and they want people to be able to sing songs together it's fine. If perhaps they would like to put on a tape that (613) accompanies these people I think it's fine if it is for these people, if it is not a public performance where they are trying to fill the entire area.

In the case of Rock Against Racism this was true. They did a number of sound checks prior to noon and it was without objection because it was clear that it was sound checks and it was clear that they were trying to get their sound level corrected so that they would be prepared to go at noon.

Q. I don't think that the question regarding acoustic versus nonacoustic has really been explained. Could it fairly be said that acoustic instruments are traditional instruments, such as non-electric guitars, oboes, flutes, violins, so on and so forth? Is that your understanding of what acoustic instruments are?

A. Without amplification. I mean, if you amplify an acoustic guitar with a pickup it may as well be an electric guitar, there is no difference.

Q. I am inclined to agree it's a difficult line to draw. I am trying to find out where you thought the line existed.

A. I feel the line exists—again, this is quite conjecture in a certain sense—if someone comes with the traditional instrument, as you suggest, as long as it's unamplified, they may play till their heart's content prior (614) to noon. If they put a pickup on that—you could put a pickup on an oboe, a guitar, a harp, any kind of instrument—then it's an amplified instrument at that point.

Q. Okay. Let's talk a little bit about the question of what size crowd the bandshell is capable of holding. I believe you referred to the bandshell grounds.

A. The concert ground?

Q. The concert ground. Can you point out on the map what area you regard as the concert ground?

A. Framing it on here, this refers to the concert ground. Now, you have your bandshell here. Generally you can refer to the entire area as the concert ground. This being west, so it would be east to the bandshell itself, the northern perimeter of the mall, and this is the southern perimeter, where the stairs go down Bethesda Terrace. This is the concert ground as we identify it.

Now, generally, for audience purposes and for our seating purposes, we regard the area—it's a smaller area within here. It's essentially a large box, probably measuring 100 by 200 feet, where we have seating area, where we have, you know, our barrels for litter and things like that.

Q. Can you tell me approximately what percentage of this entire area that you originally outlined this 100 by 200 foot smaller box is?

(615) A. Not knowing the scale on here, all I can do is go something like that. However—

Q. Okay. Can you now tell me why it would be impractical for people to gather in this, although imprecise, admittedly much larger area?

A. The impracticality comes from the fact that on a weekend this entire area here is filled with park users, roller-skating, trick bicycles. These are volleyball nets.

Q. I think I have limited myself to the edge of this.

A. One of the difficulties here—I am not saying it's totally impractical. Certainly people may be here. However, people walk up the mall, and as the mall was designed—

Q. Can you tell me—

THE COURT: You really have to stop interrupting, Mr. Fosbinder. The witness is doing pretty well responding to your questions, but you don't help by breaking in all the time.

A. The way the mall is architecturally designed, people come up the promenade to this area. As you see, if you reach this area and this is full with people there is an impasse here. Where do you go? How do you get to Bethesda Terrace? How do you get through here to Sheep Meadow or back up here to Rumsey Playground?

(616) So that's a concern of ours, is to keep this walkway open. So we try and keep the audience crowd on this side. That way there is no conflict between the audience and people who are going to other areas of the park.

Admittedly, it's a very difficult line, where you say, well, you can't step over this line. Certainly people—these islands are grass islands surrounded by benches. Certainly people sit back here and observe a concert at the bandshell mall. But that doesn't interfere with the traffic here. What we're concerned about is this traffic flow.

Some of the other problems you have is we park our vehicles down here. When I say "we"—excuse me—I mean the sponsor's vehicles down here. Getting vehicles up here to the concert ground and back down is difficult if you're full of people throughout here. So we try and have routes free that are open. Also for ambulances to enter should there be an emergency.

That's the best description I can give you.

Q. I have one more question. Can you tell me approximately the distance from the front of the bandshell to the back of these islands which you have identified as grassy?

A. It's a guess. It's a guess. I really couldn't (617) say until I walked it out. That may be 100 yards, it may be 150 yards. It's a guess though.

Q. One maybe final point, at least. Can you tell me what is the procedure for allocating the bandshell site if you have conflicting applications.

A. It is essentially a first come, first serve situation. However, what's examined is if a group has other permits in. For instance, sometimes a group will put in a permit for five or six dates. Now, in a case like that we honor their first date. However, after that, in fairness to other groups, we try and allow other groups to use the facility on the potentially successive days. So we try and give everyone their first choice of a date.

A case in point—as a matter of fact, one of the exhibits already brought forward—was with the Fourth Wall Repertory Theater. They had requested a number of dates and I gave them their first choice of dates. However, there were a number of other applications in and I simply turned them down. Mr. Bear came to me and he said "Listen, if you have an opening any other time in your season can you give me a call, can you let me know," and in fact we had an opening in September and they presented a second concert.

So that's how we deal with those situations.

Q. Let me try to restate the policy and then you (618) can tell me if this is the policy. It's first come, first serve for your first application for each year and for each subsequent application it's whether or not you feel you can fit them in?

A. No. We are trying to respect that there are many, many people who try and use this multiuse facility. We do not feel that a group should dominate that to the exclusion of other groups. We also feel that where necessary we will assist groups in getting the date they require.

For instance, in this case, as I have already testified, Rock Against Racism had not filed a permit for 1987. I had already received enough permits for May that would have made it impossible to accommodate Rock Against Racism at the Central Park bandshell. However, as a manager of a facility I feel a certain responsibility to find out what their interest is, because we're in litigation. Are they interested in hosting another performance, are

they interested in having another festival there? And so there are occasions where we will make the phone calls and we will see what the group's interest is.

Q. Is it fair to say that your testimony is that the frequency of use of the Central Park bandshell creates many of the problems that you have to deal with?

A. You mean the number of dates that the facility

(619) is used?

Q. Yes.

A. That's correct.

Q. Are you aware of any policies that the Parks Department has which would discourage the use of other areas in Central Park for First Amendment activities?

MS. LIBERATORE: Your Honor, I object. That's beyond the scope.

THE COURT: Sustained.

MR. FOSBINDER: That's it.

THE COURT: Further questions by the defendants of this witness?

MS. LIBERATORE: Yes, your Honor.

RECROSS-EXAMINATION

BY MS. LIBERATORE:

Q. Do you have Defendants' Exhibit G?

A. I don't have G.

Q. Let me refer you to section 9 of Defendants' Exhibit G. I am referring to subparagraph (a). Would you read the final phrase in that paragraph?

A. The final phrase is "Above the surface of any park for any purpose whatsoever, except as permitted by the commissioner."

Q. Are the use guidelines that have been marked as Defendants' Exhibit F promulgated by the commissioner of (620) the Department of Parks?

A. Yes, they are.

Q. With respect to the suggestion that Mr. Floyd made concerning tilting speakers—

A. Yes.

Q. —could you describe in more detail what that would have involved had the Department of Parks implemented the suggestion?

A. It would have—one of two things would have had to be done. We would have had to fix guy wires at the bandshell approximately 20 feet long with electric winches. You would then winch the speakers up each event, hang them overhead for the event, slant them down. It's an excellent method, except if you have to do that every week. Most facilities that do it are permanent facilities, where you put them up once and they stay there. You don't have to worry about winching them, you don't have to worry about personnel, you don't have to worry about the guy lines, things like that.

The other method would have been to build towers approximately 20 feet tall. You would still have to get the speakers to the top of the towers somehow and just sit them up there and slant them down. We felt there was a danger in both methods, specifically with towers, when we're not there, since it's not a facility that could be (621) locked up. People could certainly get on them, jump off them, things like that. So we felt that that system—the suggestion of that was prohibitive costwise.

There is also no guarantee that it was going to reduce the bleed to outside areas. Rather, it was a suggestion, but it didn't seem one that we could implement.

Q. Let me direct your attention to Isaac Asimov's letter, which is one of the Exhibit H exhibits. I believe it's Exhibit H 3. Is this letter dated?

A. This letter is dated May 4, 1986.

Q. Up until the date of May 4, 1986 had there been any amplified events held at the bandsheil in 1986?

A. There were no—the March of Dimes has an event where people sign up and as such they have used our sound system to tell people which lane to get in, you know, where to get their registration cards for the walkathon.

Q. But there was no amplified musical festival type of event before that?

A. That's correct. Rock Against Racism was the first concert of the 1986 season.

MS. LIBERATORE: If I may have a moment, your Honor.

THE COURT: Yes.

(Pause)

Q. Mr. Killian, if you were to direct the sound (622) technician from New York Sound during an amplified event to lower the sound volume would he comply with your direction?

A. This is during a publicly sponsored event?

Q. You and I have difficulty with private and public. A private sponsor is involved in this event, yes.

A. I believe so.

MS. LIBERATORE: One more moment, your Honor.

(Pause)

MR. PINES: Your Honor, if I might be heard just for a moment. One problem we have, just for the purposes of our record, is that we're trying to figure out the most efficient way of describing Mr. Killian's testimony about the bandshell area, and I would ask the court's permission, if possible, basically to lead Mr. Killian through his prior testimony, simply describing where he was referring on the map, because there is no testimony linking the map to the testimony. There is a lot of over here, over there. I would ask the court's forbearance on that.

THE COURT: Use a red pencil, whatever you like, and make it an audiovisual exhibit.

BY MS. LIBERATORE:

Q. Mr. Killian, let's start with where on this map are the cars parked for the sponsors. Mark it with Cars.

A. Of course, this is dependent on how many cars are requested in the area.

(623) MS. LIBERATORE: Let the record reflect that the witness has written the word Cars in the area indicated at Center Drive on this map, Defendants' Exhibit A.

Q. Would you outline in red the larger area you consider the concert grounds total on the map.

A. Total on this map, it would be an area like that.

Q. So the concert ground is the smaller of the two areas that you described previously?

A. That's correct. Generally—and I am only sketching this, without walking it out—it's approximately this area here.

MS. LIBERATORE: Let the record reflect that the witness has drawn a rectangular figure emanating out of the bandshell area, just above the word Concert Ground on the map.

Q. Could you indicate where the pedestrian walkway that you have described is on this map? Call it Walk, put the word Walk in red.

A. And that walk comes up or can go this way. Of course, it may go this way also.

MS. LIBERATORE: Let the record reflect that the witness has written the word Walk in an area that commences from the left hand of the map and continues through the area designated on the map as Concert Ground.

A. Just for notice, this is 65th Street here or—(624) it's not quite, because there is a drive here, but that would be equivalent to—actually, 67th Street—excuse me—67th Street.

Q. So the left side of the map is then 65th Street, approximately?

A. No, no. This is 67th Street.

Q. 67th Street, approximately. And where the Terrace Bridge begins—

A. The stairs to the terrace begin just south of 72nd, this being 72nd Street here. The stairs are—

Q. Okay. Would you write the word Stairs in the area you're indicating the stairs.

(Witness complied)

MS. LIBERATORE: Let the record reflect that the witness has written the word Stairs in an area that's just below the word Terrace Bridge and number 1 on the map, Defendants' Exhibit A.

Q. In what direction would the vehicles move in order to get from the area where they are parked to the area that is the concert ground or the bandshell?

A. They would have to move either this way and through here or they may also move this way and down. They may also take a third route and go down this way, though we try and limit this way, because it's very difficult. It's really not featured here, but there is like a curve here (625) that's very difficult to jump. So we try to send them down this way.

MS. LIBERATORE: Let the record indicate that the witness has drawn arrows indicating routes that vehicles would take in order to get from the parking area to the bandshell area.

Q. Would you write the word Route on each of the arrowed lines.

(Witness complied)

Q. And the grassy islands I believe you talked about, could you just put a capital I on the island.

(Witness complied)

MS. LIBERATORE: Let the record reflect that the witness is drawing capital letter I's on five separate islands that are above the word Music Pavilion on Defendants' Exhibit A.

A. Not seen on this map, if I may say, there are other islands. This is a rough one here, there is one here, and there is another one back here. These are smaller islands where there is simply a tree and, you know, three feet of grass or something. But there is a tree and there is whole curb line.

Q. In the event of a medical emergency at the bandshell what route would an ambulance take in order to—

A. It would depend on where the ambulance is coming (626) from. Perhaps it often would enter this way and onto the concert ground.

Q. Enter from what street onto—

A. 72nd Street.

Q. So it would enter from the 72nd Street gate?

A. That's correct.

Q. And go through and up—

A. And turn south to the concert ground. The thing that should be said, however, is ambulances, especially in the park, have a certain license, shall we say, to drive whichever way they want in order to get to the facility fastest. So sometimes they will be entering really against the flow of traffic in the case of ambulances.

Q. Do the ambulances use the roads as indicated or do they use the grass areas?

A. They don't use grass. However, they will use occasionally walking paths also. For instance, they can come through here and shoot into the bandshell, they can also come up through here and come into the bandshell. There are many routes of access. These are walking paths, but ambulances do drive on those.

Q. Would you just draw, entering from 72nd Street and Fifth Avenue, the route that an ambulance would take from there?

A. Might also enter there.

(627) Q. Would you just put the word Ambulance on the drawn red line.

(Witness complied)

MS. LIBERATORE: Let the record reflect that the witness has written the word Ambulance on the red line indicating the route that an ambulance would take.

Q. Mr. Killian, let me show you Joint Exhibit 1, beginning with page 67. Do you recognize what commences on page 67 in that exhibit?

A. Yes. This is a report to the Central Park Conservancy prepared by the Sociology Department, the Graduate Center, City University of New York.

Q. How are you familiar with that report?

A. This is one of the reports that I used to obtain and draft the guidelines for the use of the Naumburg Bandshell.

Q. Specifically, what does that report deal with as a general subject matter?

A. Specifically, it deals with a number of people in the park, types of activities they come to the park for, locations in the park where they congregate and use of those facilities, and also essentially—it's a user survey directly.

Q. Does that report describe the uses of the bandshell area?

(628) A. It describes and reports for usage in the south end of the Central Park, which is what the bandshell is in.

Q. Does it mention the bandshell in particular?

A. I haven't looked at this in a while. Excuse me.

Q. Okay.

A. I believe it basically speaks of use of the park, pedestrian traffic through the park, and in those respects it speaks of the bandshell, Bethesda Terrace and the mall area.

Q. What does the survey indicate with respect to the uses of the bandshell area?

A. Well, again, to that area of the park, almost 60 percent the primary activity is relaxation. The weekend—

Q. There is no question.

A. I'm sorry.

Q. Can I direct your attention to page A 97 of the Joint Exhibit 1.

A. Yes.

Q. Do you recognize what that is?

A. Yes. This is the supplementary special event permit application for the Central Park bandshell.

Q. Is that one of the forms you were referring to previously in your testimony concerning sending out additional forms to sponsors who want to use the bandshell?

A. Yes, it is.

(629) Q. And page A 98?

A. Yes. That's the second page of that form.

Q. Is that the tech information form you were describing previously in your testimony?

A. No. The tech form is pages A 95 and A 96. They are two separate forms.

Q. You're right. I'm sorry. So then A 95 is where the tech form begins and it's completed at A 96 of Joint Exhibit 1?

A. That's correct.

MS. LIBERATORE: No further questions, your Honor.

THE COURT: Plaintiff's counsel may inquire, limited, of course, to the most recent examination.

MS. FOSBINDER: Most assuredly.

REDIRECT EXAMINATION

BY MR. FOSBINDER:

Q. With regard to the supplementary special event permit application form, you want to know if a group is profit or nonprofit, is that correct?

A. That's correct.

Q. And if they are nonprofit you want to know their federal identification number, is that correct?

A. Their tax exempt number, that's correct.

Q. If they don't have one of those you want to know (630) their Social Security number. Is that for purpose of identification?

A. That's correct.

MR. FOSBINDER: Thank you.

THE COURT: Anything else?

MR. FOSBINDER: No.

BY THE COURT:

Q. Mr. Killian, I have one or two questions. At one point during your testimony—it may well have been yesterday—you said that as far as New York Sound was concerned, the cost for the season was between $24,000 to $26,000. At least, my note indicates that you said that.

A. The overall cost, when you include not only public use but use by the Parks Department and the Central Park Conservancy.

Q. Then you may have dealt with the discrepancy that I am about to call to your attention, but I would need your further explanation. You then said a little later on that New York Sound gave you an overall bid for a season of 50 shows which translated on a daily basis to $400 a day.

A. That's correct.

Q. Did you also say that?

A. That's correct.

Q. $400 a day times 50 shows is $20,000.

A. $20,000.

(631) Q. Why is the total cost $24,000 to $26,000?

A. As I believe I testified yesterday, it was between 50 and 60 shows. The actual number of shows was somewhat higher, I believe.

Q. I see.

A. I am just remembering the dollar figures. But that was their original bid and we had extra shows. I believe, specific to, for instance, Mr. LaSelva renting microphones, he paid the additional cost there, but that came through New York Sound. He did not go out and get them. New York Sound went out and got them, but he paid the cost.

Q. Let me put it to you this way: When an event, a privately sponsored event for which the New York Sound system has been used, is completed does New York Sound then send you an invoice to cover its services for that particular event?

A. That's correct, though oftentimes they gang an invoice up for a number of performances.

Q. Right. When they bill you for a particular event, whether it's an invoice for a single event or an invoice which covers a number of events, are the events billed on the basis of the actual hours that the events lasted or is it on the daily basis?

A. It's on the daily basis.

(632) Q. So the charge will be the same whether the event took two hours or six hours, true?

A. That's correct. However, obviously, what the department receives for that will differ.

Q. True. Were you present, sir, at the Rock Against Racism concert in 1986?

A. In 1986, for the entire event.

Q. Were you there at the beginning?

A. I was there near 6 a.m. and I left near 9:30 p.m.

Q. Did a time come during the actual performance when you regarded the sound level as excessive or impermissible?

A. Yes.

Q. Did you take any action with respect to that?

A. Our feeling, and when I say "our," on the advice of counsel, given that we had been in litigation, was to allow Rock Against Racism to conduct the event as they wished as long as there were no safety hazards involved or imminent possible injury to park users. So our feeling—and I requested this of both the New York State Police Department and our own Park Enforcement Patrol—was that we allow the event to continue as Rock Against Racism saw fit.

Q. All right. Thank you.

(633) THE COURT: Anything further?

MS. LIBERATORE: Could I inquire, your Honor?

THE COURT: Yes.

RECROSS-EXAMINATION

BY MS. LIBERATORE:

Q. Mr. Killian, could you explain why the $100 per performance hour sound system fee was selected rather than a per diem fee, as charged by New York Sound?

A. The question was raised in a meeting. It would be dangerous for a group that perhaps was using the facility for one hour. They may not have the resources to pay $400 for an event. That fee, however, was decided upon when we were in the bid process and the bids ranged—a large fluctuation, you know, $600, $700. So we weren't entirely sure what that final cost would be. However, we felt that we did not want to exclude anyone from using the facility if they were going to use it for a short period of time, to tack on a large cost to them.

Q. So then your concern in establishing the $100 per performance hour fee was a sense of fairness towards people who would want to use the bandshell?

A. That, in addition that we needed—we felt we needed a specific number to give people so that they could plan and predict upon that and it wouldn't fluctuate. But what you're saying is true.

(634) Q. Was it also an effort to perhaps let additional groups that otherwise would be unable to pay a higher rate use—

THE COURT: Don't lead. Were there any factors in his mind, and if so, what were they.

Q. Were there any other factors in your mind when you were discussing the fee arrangement?

A. We hoped to make it affordable for people who wanted to present performances there. They could get a high quality sound system as a very reasonable cost, without profit or loss on the part of the Department of Parks and Recreation.

Q. And at the end of the 1986 season did your prorating of fees to private sponsors in fact correspond to what was paid by the Department of Parks to New York Sound for those privately sponsored events?

A. Again, there was a slight loss on the part of the Department of Parks and Recreation.

MS. LIBERATORE: No further questions, your Honor.

THE COURT: Anything further of this witness?

MR. FOSBINDER: I think not.

THE COURT: All right, Mr. Killian. Thank you. Your testimony is concluded and you may withdraw.

THE WITNESS: Thank you.

* * *

Transcript of Proceedings on March 23-25, 27, 30, 31 and April 1, 1987
Testimony of Robert Russo,
Witness on Behalf of Plaintiff

* * * (636) ROBERT RUSSO,

called as a witness by the plaintiff, having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. FOSBINDER:

Q. Good morning, Mr. Russo.

A. Good morning.

Q. Could you tell me who you are currently employed by?

A. Yes. I am employed by the New York City (637) Department of Parks and Recreation.

Q. And what is your position?

A. It is deputy commissioner for operations.

Q. As deputy commissioner for operations what are your duties?

A. I have responsibility for park maintenance and operations for the City of New York park system.

Q. Could you give me a little more information about how your duties involve the permit process regarding special event permits for Central Park?

A. One of the areas under my supervision is recreation. It's a division of the agency. Special events are part of that division, the office of special events.

Central Park is a somewhat similar situation but there is a difference. The difference is that Central Park has an administra-

tor's office. The administrator has a number of—it's sort of a slice of the system, Central Park, that has its own hierarchy because of its special needs. So it's somewhat— it's a little bit different.

Q. Do you oversee police operation in Central Park?

A. No, I do not. That's the New York City Police Department. There is a Central Park precinct within the confines of the park.

Q. Are you involved with that?

A. Only involved with them as liaison between (638) agencies. But no, I have no authority over the Central Park police.

Q. Could you tell me when you first met Mr. Killian, approximately?

A. I guess it was about two years ago, my best recollection.

Q. When did Mr. Killian become an employee of the Parks Department?

A. I don't—maybe 18 months, something like that, 18 months, two years.

Q. Did you have occasion to discuss with Mr. Killian new guidelines for the Naumburg Bandshell?

A. Yes, I did.

Q. Can you tell me when you had discussions with Mr. Killian, approximately, and what you recall was the substance of those discussion?

A. I don't recall exactly when Mr. Killian was hired, but I would say within the first six months after he was hired. He was hired to manage the bandshell because of the multitude of events at the bandshell and because we also—his background is in producing events. In his former occupation he did that. We were

looking for someone who could not only manage events that we had permits for at the bandshell, people who apply during the year, but also to bring in additional events, and he has done that.

(639) Q. Do you recall any of the substance of your conversation with Mr. Killian with regard to the proposed or now Naumburg Bandshell regulations?

A. Yes. We spoke about the need to have some regulations that could be presented to people who wanted to apply for a permit at the bandshell that would be uniform, and Joe Killian then, I think with others, drafted a proposed list of regulations and we reviewed it.

Q. Were you involved in the process of drafting those regulations?

A. Not—I didn't sit down and write them. We discussed them.

Q. Did you discuss with Mr. Killian, to the best of your recollection, sound problems regarding the bandshell?

A. Yes. I told him that we had lots of groups who came in and had varying abilities to produce an amplified sound. Some didn't amplify at all, some had—would come with their own systems, and I thought that we should do something to make this more efficient, to manage it for all the groups, for each and every group that came in. Some were unable, for example, to even get somebody to amplify sound for them and they would come to us and ask us to do it and we were unable to do that. We didn't have the capability at the time to really do it well.

Q. Did you tell Mr. Killian that there had been a (640) problem with groups using the bandshell using inadequate quality equipment or bad technique for sound amplification?

A. I don't recall saying that specifically.

Q. Did you discuss with Mr. Killian the fact that the city had had a lawsuit filed against it which was still in process at that point regarding the bandshell?

MR. PINES: Your Honor, I object on the grounds of relevance.

THE COURT: Overruled.

A. I am sure that I did talk to him about it. I don't recall the specific time or the conversation, but I am sure that I told Mr. Killian all about that.

Q. When would that have been, approximately?

A. Probably sometime during the first six months or so.

Q. Can you make any better estimate as to how much prior to the May event in 1986 you discussed this with him?

A. No, I don't remember. Within the first six months I would say.

Q. Do you remember what you told Mr. Killian the problem of the lawsuit was in terms of the city's problem?

A. Yes. I believe what I told him was that it was a problem of loudness.

Q. Did you inform Mr. Killian that the court had not allowed the city to impose an arbitrary restriction on (641) Rock Against Racism regarding volume level?

MR. PINES: Your Honor, I object to the form and relevance.

THE COURT: The witness may be asked what it was that he told Mr. Killian about the litigation. I would prefer to have the words come from the witness' mouth.

Q. Do you have any recollection of what problems you told Mr. Killian you had regarding the lawsuit or what problems the lawsuit posed for the city?

MR. PINES: Your Honor, I object to the form of the question.

THE COURT: No, I will take it.

A. Can you say that again, please?

THE COURT: Read it back.

(Question read)

A. Yes. I think what I said to Mr. Killian was this, that we had a disagreement, and it had gone to court, about the volume of the sound amplification at this event, Rock Against Racism, and that Parks Department people, myself included, felt that it was excessive, and that we had gotten some complaints over the years, several years, about the excessive sound, and we were trying to determine whether or not we had the authority to regulate, within reason, not just Rock Against Racism, but how loud sound can be in a public park.

(642) Q. Did you discuss with Mr. Killian the feasibility of a specific decibel limitation?

A. I don't remember discussing that specifically, although I may have told him that that had been tried, that we had at least one year that I can remember done some measuring of sound, although that was problematic as well, because it is—that is not—I don't think it's as purely scientific as we might have all felt it was at one time.

Q. Do you recall whether or not you discussed with Mr. Killian what your understanding of the limits on the city's ability to regulate sound were at that point, as the court case evolved?

MR. PINES: Your Honor, I object to this inquiry. The issue in the case is whether the regulations are in fact constitutional. That's a finding that the court should make. Whether this witness has an opinion on that issue I think is completely irrelevant. His thinking about the wording of the regulation or the guidelines is

certainly relevant, but the conclusion about the legality is really reserved for the court.

THE COURT: I am not certain that that was the thrust of the question. Read the question back.

(Question read)

THE COURT: Yes. I will sustain the objection. (643) His understanding as to legal limits is I don't think pertinent. But I will grant counsel some latitude in inquiring as to how these regulations came into being in the context of the pending litigation.

MR. FOSBINDER: Okay.

Q. Do you recall any other problem that you felt existed with regard to the bandshell that you discussed with Mr. Killian?

A. Yes. The regulations say a lot more than—discuss a lot more than sound for a lot of events, and over the years my feeling has been that we have packed the bandshell, so we have a suggestion, a limit on the number of people who shall be in the bandshell for an event.

So we felt that that was a problem, the number of people, because there is a pass-through just west of the bandshell which can get blocked called the dead road in Central Park. We also have roller-skating on that road and volleyball playing. So we felt that the size of the crowd should have something to do with what the venue is, where in the park or where in the city an event is conducted. There is a difference, for example, between a group that would attract 100,000 and one that would attract 500.

So that was one aspect of the regulations. Sound was another, which I think I mentioned before. I think there is a liability clause in there about having (644) insurance. Those kinds of things. They are broader than just sound regulation.

Q. To get back to sound for one more moment, did you suggest to Mr. Killian that in the course of writing the regulations he

should attempt to create the regulations in such a manner that the city would have the power to control the sound level at the bandshell site?

A. Yes.

Q. Did you make any suggestions to Mr. Killian as to how that might be accomplished?

A. We discussed a number of options, I guess ranging from at the time—we talked about people bringing equipment in and having a predetermined or agreed upon decibel level. But, however, we discounted that because all people couldn't do that or didn't want to do it.

We knocked around a number of ideas. We thought that the best one was the one that we decided upon, which is to get an outside group that was recognized, being independent, but a very reputable sound amplification outfit, and see if they would come in and do this for us, because we felt it was outside of our expertise and outside the expertise of a number of groups or even the availability of a number of groups that come into the bandshell.

There are large events and small events at the (645) bandshell. Some are dance events that don't even require much amplification. There is a whole host of things at the bandshell. We have a full concert series there in the spring and summer.

Q. Do you have any specific knowledge of any other individuals in the Parks Department who Mr. Killian consulted with regarding these new regulations?

A. Yes.

Q. Who?

A. Well, he certainly consulted with William Dalton, who is the head of the Urban Parks Service, myself, Kate Pearson, I think, although she may not have been on the board. Whoever was the special events director at the time. It may have been Kate

Pearson, it may have been Alice Cashman. I am not certain whether Alice Cashman had left at that point. One of the two.

Q. If we could turn to the previous year, could you give me your best recollection of how the permit process worked during the prior year?

A. Prior—which year?

Q. Prior to Mr. Killian's arrival.

A. Yes.

MR. PINES: Your Honor, I would object as cumulative. We have already had extensive testimony on this process.

(646) THE COURT: I am not going to go through it all over again, but perhaps to test the accuracy of other witnesses' testimony I will permit it up to a point.

MR. FOSBINDER: Thank you.

A. Do you want me to respond now?

Q. Yes.

A. Okay. I preface this by saying one of the reasons we hired Joe was to have what I refer to as one-stop shopping. Prior to Joe's arrival it was not difficult but it was cumbersome, I think, to get a permit for the bandshell, because one would have to go to our office on 61st Street in Manhattan to see Sheldon Horowitz and get a permit application, which would have to be filled in at the time, then I believe there is a separate permit for sound that the Police Department issues. Those permits would necessarily have to be reviewed by the person responsible for events in Central Park, and specifically the bandshell, which is a different person from Sheldon Horowitz.

I felt that that was cumbersome and was unnecessary, that we should have some one person to whom all applicants can come and get the necessary papers and do it speedily, at least, more

speedily than it was done in the past. And also there are permits for vehicles if you're going to bring vehicles in the park and I just (647) didn't think that people should have to chase around and go to different people for these things.

So we unified that under Mr. Killian. But the obverse was true prior to his coming. You had to go to two or three places to get these papers and fill them out. It was silly.

Q. Could you tell me how the permit approval process worked in the year prior to Mr. Killian, as you best recall it, with specific attention to what your role in that process was?

A. Maybe I should answer that—back into it. My role was virtually negligible. However, if we had a major special event, a major concert, which would mean most likely something outside the bandshell, such as the Great Lawn, where we would have—expect a large crowd, have to have lots of other agency involvement, notably the police, sanitation, I would be involved in those negotiations with the producers or promoters of the event. But on individual permits for the bandshell, I would rarely, rarely see them, even then, even under the old system.

Q. Could you tell me what the old system was, Mr. Russo?

A. You probably should understand that I had a different job at that time. But anyway, the old system was as I described it. You would go to 61st Street, get the (648) permit application, fill that out, do what was required by it. That would be sent to the building I work in, which is in the Arsenal in Central Park, to the special events person, who would review it. The person who was applying would be directed to get a sound device permit, I believe it's called, from the Police Department. They would probably do that the same day in most cases because it's right in the park. And I think the sign-off ultimately was from the Manhattan borough office, whoever was the borough park commissioner for Manhattan I believe signed off ultimately on them.

Q. Let's just go directly to your best recollection of the Rock Against Racism permit application in that year. Were you consulted with regard to that application?

A. This is for 1984 or '85?

Q. In 1985.

A. 1985?

Q. 1985.

A. Yes. In 1985 we were in court. That was the year we were in court. Yes.

Q. Can you tell me who consulted you with regard to the Rock Against Racism permit?

A. I don't remember. It may have passed across my desk. It doesn't mean somebody consulted me. It may have come across my desk. It would have been something that I (649) would pay attention to, having gone to court or going to court. Of course, it would be sent—something that is known about the agency.

Q. Did you favor granting the permit or did you disfavor granting the permit to Rock Against Racism for the bandshell that year?

MR. PINES: Your Honor, I object to the form of that question on the grounds that he can ask if he was involved or if he had any opinion about it. On the basis of the testimony it's not even established that he had any role in that decision-making process.

THE COURT: I will overrule the objection to the form. Read the question back.

(Question read)

THE COURT: Or neither of the above.

A. I think I had mixed opinions, actually, in that year. If I could—recollecting, if I could have cut out the loudness part of

the permit, I would have been opposed to giving permission to allowing the group to amplify its own sound.

As far as the event is concerned, I had no problem with the event. It has occurred for years and I would not disapprove that. I didn't then and I don't now.

Q. Do you recall telling the court that this group was dishonorable?

(650) A. Yes.

Q. Did this feeling about the group Rock Against Racism play a role in your decision, whatever part you may have played in the decision process? Let me rephrase that.

Was this one of the reasons for the rejection of the permit application of Rock Against Racism, your belief that this group was dishonorable?

MR. PINES: Your Honor, I object to the form. There is no foundation for this question. Counsel hasn't even established what role if any Mr. Russo had in deciding—

THE COURT: Sustained.

MR. FOSBINDER: I am at a loss, your Honor. In 1986 Mr. Russo testified in response to a question and I am trying to elicit whether or not his recollection is different today. He testified in response to a question "I want to understand"—

MR. PINES: Your Honor, I object. If counsel wants to elicit testimony, that's one thing. He is now testifying. I would suggest that he ask questions.

THE COURT: First establish as a matter of foundation, Mr. Fosbinder, that the witness participated in the decision.

Q. Is it your testimony at this point that you did not participate in the decision regarding the Rock Against Racism permit?

(651) THE COURT: In 1985.

A. No, that's not my testimony.

THE COURT: All right. Go ahead.

Q. Could you tell me what the reasons for the rejection of that permit application were?

MR. PINES: Object to the question. There has not been a foundation established as to whether there was a rejection.

THE COURT: Overruled.

A. Yes. As I testified in the past, my experience with the group, the culmination of it—and I did say that they were dishonorable—had to do with a number of things.

I would also like to say, by the way, that the issue, the sole issue—I think that my opinion has very little to do with this at this point and the sole issue is loudness of sound.

But why I said the group was dishonorable was the culmination of a number of things, such as having—we had, for example, a meeting in the Central Park precinct with I think Dean Tuckerman was there and others from the group and myself and some of the police people, where we agreed—I think we had an agreement to meet at the bandshell the morning of the event and set the sound, and that really never happened, although we were there. We had people from—I don't recall—from the Environmental (652) Control Bureau.

I mentioned that I felt that the group made it very difficult for us to work with them. We asked repeatedly, for example, for a bond, which we ultimately got almost literally at the eleventh hour before the event, and it was far less than what we asked for.

We had many, many meetings with the group over the years, in the Borough of Manhattan south at the police, in the north at the arsenal, lots of different places, and the negotiations were always very difficult, never wanted to agree, and then when we did agreed they violated the agreements.

I think almost every year that I had experience with the concert, the performance, the event extended over the time that we had agreed that it should be ended. More vehicles were always brought into the park in the events that I remember than we had agreed to. We asked the license plate numbers of the vehicles so we could give them permits, so the people who were at the gates when the park is closed can let the vehicles in. They were never submitted. Vehicles were unregistered that came into the park. Vehicles were given summonses that were never paid. Environmental Control Board summonses were given out. They were never paid, they were defaulted.

That's why I say they are dishonorable, some of (653) the reasons, that's why I said it.

Q. Were you involved in the decision to offer the alternate sites of Randall or Ward Island to the group?

MR. PINES: Object on the grounds of relevance.

THE COURT: It certainly doesn't bear on the validity of the present regulations, does it, Mr. Fosbinder?

MR. FOSBINDER: No, that's true.

THE COURT: If your suggestion is that it bears on compensatory damages, I don't see how it does that either, because they didn't go to the alternate sites.

MR. FOSBINDER: It would only bear on them in the sense that the city did not offer an equivalent substitute to Central Park and therefore Rock Against Racism would be reasonable in viewing themselves as being turned down. In essence, the city said "We're not really turning you down, we're just giving you the alternate equivalent site," and in order to prevent that as a defense I want to establish where the sites were.

THE COURT: The prior record of what the plaintiffs complained of and what the defendants did forms a part of this trial

under Rule 65. It seems to me that subject has been adequately covered.

MR. FOSBINDER: Okay. That's fine. If that's the situation, there is no problem with that. If I can have a minute.

(654) THE COURT: Yes.

(Pause)

MR. FOSBINDER: No further direct.

THE COURT: All right. Counsel for defendants may inquire.

CROSS-EXAMINATION

BY MR. PINES:

Q. Mr. Russo, directing your attention to the years prior to 1986, do you recall whether there were ever any disagreements on the day of the event with RAR over the regulation of sound?

A. Yes. But may I say something about this? The events—and it may be true for others in this room—tend to mesh over the years. It's very difficult for me now, with the hundreds of events that we have in the park, to distinguish between '82 and '83 or '83 and '84. So I can answer you by saying yes, that we always had a give-and-take about the volume of sound.

We would go to various people—it was different people—over the years and ask them to turn it down when it got very loud—when I say very loud, you could hear it on Central Park West—and sometimes they would comply and sometimes they would not, sometimes they would comply and turn it up again, that kind of thing.

Q. Was there in any of the years you can remember (655) ever a single designated person that RAR provided to you as the person that would be responsible for resolution of sound issues?

A. I think in '85 Christy Robb was the person that we dealt with mostly, and I would say—that was probably the first year that we had one person who we could—who was actually there and who could be reached during the event or during all of the event.

Q. In years prior to that was there one person?

A. Well, it was principally Dean Tuckerman, but not all the time. You would talk to different people. You know, we would have to reach out to different people. It was difficult.

Q. Why was it difficult?

A. Because you get a runaround, essentially is what would happen. You have to understand, we have a command post truck

right adjacent, almost adjacent, 30, 40 feet from the stage or a vehicle or some identifiable park police operational headquarters that we're always reachable at. So it's easy to find us but not always easy to find not only Rock Against Racism, other events people.

Q. In your dealings with Rock Against Racism prior to 1985, when you were dealing with different representatives of the group, did you encounter any variation in the attitude of the group in terms of their (656) cooperation with you on the sound level issue?

A. Variation from year to year or variation during the day or—

Q. From person to person.

A. Yes. My sense—this is an opinion—my sense was that there was some dissension between and among members of—representatives of that group about the loudness of sound.

Q. When you asked the different representatives to turn down the sound did you get compliance?

A. Not always.

Q. Can you describe what happened?

A. Well, you should also understand that it was not always me doing this and it was probably rarely me. Usually the police or some police official—

Q. Let me ask you, did you observe any incidents involving discussions of sound with RAR, specifically with respect to compliance with requests?

A. Yes.

Q. Can you describe those?

A. They were argumentative. I mean, generally an argument. Many of these things, an argument ensued about the loudness.

Disagreement, certainly. And things would be said from the microphone. I recall one year somebody would get up and say "Hey, the cops want us to turn the (657) sound down," and it would rile the crowd up and the crowd would yell, and it's not nice to be there when this happens. And it wasn't "the cops," you know, they didn't necessarily say "the cops."

Q. What do you mean by that?

A. There would usually be some slang, like pigs, something like that.

Q. Based upon your experience, would you feel it reasonable to rely upon RAR's voluntary compliance now and in the future with requests to lower the sound voluntarily?

A. Oh, no. There has been a history of—absolutely not. There has been a history of either ignorance or—they don't want to lower the sound. They want the sound I think as loud as it can possibly go. I mean, it's just the opposite of our intention.

Q. Do you have any personal opinion regarding the content of RAR's speech?

A. No, I really—no. I don't really know. I mean, it's hard—I don't really know what it is. I have listened to it, there are speeches and music, and it kind of all blends together. I really don't. The issue for me is loudness. I have to be able to—there has to be a point where I think one group's rights to amplify sound to the ears of all the other users in the park—somebody has to say "I think this is loud enough." Somebody has to say (658) that. I think it should be the Parks Department.

MR. PINES: No further questions.

THE COURT: Mr. Fosbinder?

REDIRECT EXAMINATION

BY MR. FOSBINDER:

Q. In 1984 a specific sound level maximum was requested by the Parks Department. Were you involved in the process of determining what that level should be?

MR. PINES: Your Honor, I object to the form of that question.

THE COURT: Is there no foundation in the record for it?

MR PINES: In fact—

THE COURT: I am frankly not certain.

MR. PINES: My recollection is there was testimony from Christy Robb that at one point RAR wanted to have a sound level set and I don't think there was agreement as to what that level would be. I don't think there is any testimony about a sound level having been—

MR. FOSBINDER: Mr. Schulman's testimony was quite extensive. You indicated that that is incorporated—

THE COURT: Oh, yes. Any prior testimony on the motion for a preliminary injunction forms a part of this trial record.

MR. FOSBINDER: That was my understanding, and (659) given that, I think there is a substantial foundation that the city suggested a specific number and that they required RAR to abide by it or issue a citation, which they did.

MR. PINES: Your Honor, I would simply then request that reference be made to the testimony rather than presume Mr. Russo's familiarity with testimony given in 1985.

MR. FOSBINDER: While Mr. Pines was not here, Mr. Russo was. If he doesn't recall—

THE COURT: Can you give me a reference to the transcript of the Schulman testimony?

MR. FOSBINDER: Page A 163 it begins. A173, lines 15, 16 and 17, "Tried to keep that level around 75, 77, 78." Page A 174, line 10, "At that time the Police Department—we decided that something between 75 and 78, really, it was around that level, would be more than sufficient for people in the audience to enjoy the concert and for people outside the park not to be disturbed."

MR. PINES: Your Honor, that conclusively demonstrates it was not the Parks Department and there is no testimony there that was a level set by the Parks Department. It may have been desired by DEP, by Mr. Schulman, by the Police Department.

MR. FOSBINDER: It says "we." You have to read through all the testimony. I think it's pretty clear the "we" (660) was referring to—

THE COURT: Now that we have the Schulman testimony before us, put such questions to Mr. Russo as you think that testimony justifies.

MR. FOSBINDER: Okay.

Q. Do you recall being involved in any way in the decision to request RAR to abide by a 75 to 78 decibel level maximum for the 1984 RAR event?

MR. PINES: Your Honor, I would object to that as beyond the scope of cross. He talks exclusively about 1985.

THE COURT: I will permit it.

THE WITNESS: May I answer?

THE COURT: Yes, you may.

A. I believe, Mr. Fosbinder, that that year was the year in which the meeting that I referred to that occurred at the Central Park police precinct took place, and it was decided there that the parties, which were the police, the parks and RAR, would meet early in the morning of the event in the park to decide on an agreeable upper limit, and the legal division—there was an attorney

from the legal division of the Police Department who was there who got in contact with ECB, Environmental Control Board, and had them—had some technician or technicians come down on that morning, but I wasn't there that morning. I wasn't at the (661) meeting where the thing that you referred to, this upper limit, was established, if it was established.

Q. You just said, if I recall correctly, that these people would meet the day of the event to establish an agreeable level. What at that point would have been RAR's option if they didn't agree to the agreeable level?

MR. PINES: Your Honor, I object on the grounds that it's speculative. It is also totally irrelevant. This is not what the current standards are.

MR. FOSBINDER: It's not speculative. If there was some sort of procedure that they could follow to appeal this decision I would like to know about it.

THE COURT: We're back in 1984?

MR. FOSBINDER: Yes

THE COURT: We are dealing now with the 1986 regulations. I will sustain the objection.

MR. FOSBINDER: That's it.

THE COURT: Anything further from the defendants?

MR. PINES: No, your Honor.

THE COURT: Thank you for your attendance, Mr. Russo. You're excused.

THE WITNESS: Thank you, your Honor.

(Witness excused)

THE COURT: Any further witnesses that the parties wish to call?

Supreme Court, U.S.
FILED
NOV 29 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-226

IN THE

Supreme Court of the United States

October Term, 1988

BENJAMIN R. WARD, in his official capacity as Police Commissioner of the City of New York; GEORGE SCARPELLI, in his official capacity as Chief of Operations for Department of Parks; SHELDON HOROWITZ, in his official [capacity] as Special Events Director for the Department of Parks; ROBERT RUSSO, in his official capacity as Assistant Parks Commissioner for Citywide Services, New York City Department of Parks and Recreation; JOSEPH KILLIAN, in his official capacity as Program Director for the Mall Bandshell of the Bethesda Terrace area of Central Park in the City of New York, Department of Parks and Recreation; MAYOR EDWARD KOCH, in his official capacity as the Mayor of the City of New York; and THE CITY OF NEW YORK,

Petitioners,

-against-

ROCK AGAINST RACISM,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOINT APPENDIX

(Volume II-Pages JA 351 to JA 495)

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PETITION FOR CERTIORARI FILED AUGUST 5, 1988
CERTIORARI GRANTED OCTOBER 3, 1988

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Appendix to the United States Court of Appeals for the Second Circuit:
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ROCK AGAINST RACISM A2

DEFENDANTS HAIGHT, J.

WARD, HON. BENJAMIN R., in his official capacity as Police Commissioner for the City of New York

SCARPELLI, GEORGE, in his official capacity as Chief of Operations for the Department of Parks

HOROWITZ, SHELDON, in his official capacity as Special Events Director for the Department of Parks

CAUSE **SC**

(CITE THE U.S. CIVIL STATUTE UNDER WHICH THE CASE IS FILED AND WRITE A BRIEF STATEMENT OF CAUSE)
Purs. to 28 U.S.C. 1331, 1332, 1341, 1651 and 2210; 1st & 14th Amndmts. of U.S. Const.

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DATE	NR.	PROCEEDINGS
4-18-85	1	Fld. Complaint; Issd. Summons & Notice purs. to 28 U.S.C. 636(c).
4-18-85	2	Fld. Pltff's Order to Show Cause why a Preliminary Injunction should not issue purs. to rule 65, directing said deft's to permit pltff to conduct a protest & demonstration concert at the 72nd St. Bandshell on 5/5/85, Ret; 4-25-85..Haight, J.
4-24-85	3	Fld. Pltff's atty Notice of Appearance MBG
5-2-85	4	Fld. Deft's Affdvt of Robert Russo, in opposition to pltff's request for injunctive relief.
5-2-85	5	Fld. Deft's Affdvt of Lieutenant Joseph McNulty, in opposition to pltff's request for injunctive relief.
5-2-85	6	Fld. Deft's memorandum in opposition to pltff's request for injunctive relief.
5-2-85	7	Filed stip & Order of Partial Settlement, the dept. agrees to issue to Rock Against Racism a permit to use the Bandshell area for the purpose stated above on 5-5-85, etc. Pur. to Article II, §3(d) of the Parks Rules & Regulations Rock Against Racism will be required to post an undertaking in the amt. of $1,000., no later than 5-2-85 etc. as so indicated. So ordered Haight, J.
6-14-85	8	Fld defts' ANSWER to the cmplt. CC
7-17-85	9	Fld. Order following initial pre-trial conference held on 7-12-85. . . that the action be placed on the Suspense docket of this court with leave to either party to appiy on 5 days notice for its restoration, etc. . Haight, J. cmc
9-4-85	10	Filed transcript of record of proceedings 4-26-85

DATE	NR.	PROCEEDINGS
4-23-86	11	Fld. Pltff's Motion for a Temporary Restraining Order/Preliminary Injunction against the deft from interfering with a scheduled concert.
4-29-86	12	Fld. Defts MEMO OF LAW in opp to pltffs motion for inj relief
4-29-86	13	Filed ORDER defts memo in opp to pltffs motion for TRO & prelim inj serv & filed by hand by 4/29, pltffs reply by 4/30, oral argument on 5/1 . . . HAIGHT, J. cm
5-2-86	14	Filed Defts AFFDVT of J. Killian in opp to pltffs motion for inj relief
5-2-86	15	Filed MEMO OPINION & ORDER# 59257, RAR can use its own sound system. I decline to releive RAR of the liability insurance req. all other charges apply exp sound system; permit will extend to 7pm if RAR so req . . . . Haight, J. cmc
5-19-86	16	Filed Defts NOTICE OF APPEAL to USCA 2nd Cir from USDC order of 5/2
6-3-86	17	Filed a true copy of NOTICE OF MOTION from USCA 2nd Cir; the motion for exp appeal is denied. Record on appeal shall be filed by 6/11; appellants brief & joint appendix by 6/23; appellees brief by 7/14; week of argument as early as 8/11 . . . CLERK, USCA

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Appendix to the United States Court of Appeals for the Second Circuit:
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Appendix to the United States Court of Appeals for the Second Circuit:

Motion for a Temporary Restraining Order/ Preliminary Injunction

REPRODUCED, *SUPRA*, ON P. JA 21

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Appendix to the United States Court of Appeals for the Second Circuit:
Certificate of Notice to Adverse Parties

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ROCK AGAINST RACISM,
Plaintiff,

v.

HON. BENJAMIN R. WARD, et al.,
Defendants.

No. 85 Civ. 3000 (CSH)

CERTIFICATION OF NOTICE TO ADVERSE PARTIES

Counsel for plaintiffs makes the following certification of notice to the adverse parties, pursuant to Local Rules.

On or about Wednesday, April 9th, 1986, I spoke with Joe Killian of the Parks Department concerning the new "permit application" which had been received by Rock Against Racism. Mr. Killian said that the permit application had been personally reviewed by the commissioner of the Parks Department, who he pointed out was a lawyer, and that he felt there was no chance that the requirement that the Parks Department control the sound system would be changed. Mr. Killian identified the attorney who would handle the case if we chose to challenge the various restrictions. Subsequently I spoke with that attorney who indicated that he had reviewed the document in question and believed that all the provisions were constitutional. I told the attorney that I was

leaving for Tucson, Arizona the next day to prepare for a trial there and provided him with a number where I could be contacted. I have heard nothing and therefore presume that the city has not changed its position as of April 20th, 1986.

s/ James H. Fosbinder
JAMES H. FOSBINDER

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(Local Counsel)

Joint Exhibit 1 Submitted In Evidence On March 24, 1987

Appendix to the United States Court of Appeals for the Second Circuit:
Temporary Restraining Order

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ROCK AGAINST RACISM,
Plaintiff,

v.

HON. BENJAMIN R. WARD, *et. al.*,
Defendants.

No. 85 Civ. 3000 (CSH)

TEMPORARY RESTRAINING ORDER

Upon consideration of plaintiff's Motion for a Preliminary Injunction, and the declarations, pleadings, evidence, and argument in support, and the Opposition thereto, the Court finds:

1. That plaintiffs wish to engage in First Smendment activity at the Central Park Bandshell from approximately 6:00 am to 10:00 pm (including set up time) on May 4th, 1986.

2. That defendants will apply the various prohibitions on the "new permit" against plaintiffs and have them arrested and prosecuted if they demonstrate as planned.

3. That this action by defendants will cause irreparable injury to plaintiffs.

4. That there is a likelihood that plaintiffs will prevail on the merits of this case.

5. And that the balance of injuries and public interest is in plaintiff's favor.

In light of the above, it is hereby

ORDERED, that pending further Order of this Court, defendants shall not enforce the requirements that a city-chosen and controlled sound system be used, that a $50.00 to $100.00 fee should be required, that $100.00 per hour be paid to the city's chosen sound company, that the display of banners and posters be prohibited, that the collecting of donations or sale of literature, etc. be prohibited, that liability insurance be provided, or that a bond be required; and it is further

ORDERED, that defendants shall file and personally serve their response to plaintiff's Motion for a Preliminary Injunction not later than _____, 1986; that plaintiffs shall file and personally serve any reply not later than _____, 1986; and that the hearing on the Motion for a Preliminary Injunction will be heard in this Court on _____, 1986; and it is further

ORDERED, that a copy of this Order shall be served on each of the defendants.

_____

U.S. DISTRICT COURT JUDGE

Joint Exhibit 1 Submitted in Evidence on March 24, 1987

Appendix to the United States Court of Appeals for the Second Circuit: Order for Preliminary Injunction

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ROCK AGAINST RACISM,
Plaintiff,

v.

HON. BENJAMIN R. WARD, *et. al.*,
Defendants.

No. 85 Civ. 3000 (CSH)

ORDER FOR PRELIMINARY INJUNCTION

Upon consideration of plaintiff's Motion for a Preliminary Injunction, and the declarations, pleadings, evidence, and argument in support, and the Opposition thereto, the Court finds:

1. That plaintiffs wish to engage in First Smendment activity at the Central Park Bandshell from approximately 6:00 am to 10:00 pm (including set up time) on May 4th, 1986.

2. That defendants will apply the various prohibitions on the "new permit" against plaintiffs and have them arrested and prosecuted if they demonstrate as planned.

3. That this action by defendants will cause irreparable injury to plaintiffs.

4. That there is a likelihood that plaintiffs will prevail on the merits of this case.

5. And that the balance of injuries and public interest is in plaintiff's favor.

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ORDERED, that pending further Order of this Court, defendant shall not enforce the requirements that a city-chosen and controlled sound system be used, that a $50.00 to $100.00 fee should be required, that $100.00 per hour be paid to the city's chosen sound company, that the display of banners and posters be prohibited that the collecting of donations or sale of literature, etc. be prohibited, that liability insurance be provided, or that a bond be required.

U.S. DISTRICT COURT JUDGE

Joint Exhibit 1 Submitted in Evidence on March 24, 1987

Appendix to the United States Court of Appeals for the Second Circuit: Application for a Temporary Restraining Order and Supporting Points and Authorities

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ROCK AGAINST RACISM,
Plaintiff,

v.

HON. BENJAMIN R. WARD, *et. al.*,
Defendants.

No. 85 Civ. 3000 (CSH)

APPLICATION FOR A TEMPORARY RESTRAINING ORDER AND SUPPORTING POINTS AND AUTHORITIES

Plaintiffs seek to put on an event consisting in part of speeches, and in part of music. The event has been held for approximately ten years at the same site, the Central Park Bandshell, on the same date, the first Sunday in May, and is expected to run as usual from approximately 11:30 am until approximately 7:00 pm

STATEMENT OF FACTS

Plaintiff is an organization formed to provide a non profit sound organization to be used at rallies, demonstrations, cultural festivals and other similar events. Plaintiff organization has for

approximately ten years sponsored an event on the first Sunday of [220zMay at the Central Park Bandshell. The City of New York has repeatedly attempted to deny this group access to this facility. Last year, 1985, following several days of testimony, the city dropped its requirement that the event be held at Randall or Ward Island. Subsequently various other requirements concerning control over the volume, the length of the event, the distribution and the amount of music versus speech, and hours of access for setting up, were dropped thus satisfying the plaintiff. The event went on as originally planned.

The city agreed to review its permit process and requested input from the plaintiff with regard to proposed changes. Not until the end of March, 1986, was a copy of the proposed changes provided. The plaintiff received a "new permit application" requiring, among other things, that the city be allowed to choose a sound system, that $100.00 an hour be paid to the city chosen xound company, that a $50.00 to $100.00 application fee be paid, that no banners or posters be displayed, that no literature be distributed or sold, that donations not be accepted, that a clean-up bond be provided, that the hours be limited, and that liability insurance be provided at the city's discretion.

ARGUMENT

A Temporary Restraining Order should be granted because there is a likelihood of irreparable harm in the absence of injunctive relief, plaintiffs are likely to succeed on the merits of the underlying cause of action, the balance of injuries favors granting an injunction, and the public interest would be served by granting the injunctive relief sought. *Virginia Petroleum Jobbers Association* v. *Federal Power Commission*, 259 F.2d 921 (D.C. Cir. 1958).

I-Likelihood of Irreparable Harm

Absent injunctive relief from this Court, plaintiffs will suffer irreparable harm. Plaintiffs wish to engage in protected First Amendment activity. Without an injunction, they will be arrested and incarcerated, and that is irreparable harm to the cause they espouse and to their own liberty. It cannot be given back or compensated once taken. The plaintiffs who persist in the demonstration will be forever tainted and diminished by an arrest an incarceration, and those who have foregone the protest because of the threat of arrest have lost their First Amendment rights. This plainly sets out a claim of irreparable harm.

II-Likelihood of Success on the Merits

Plaintiffs are likely to succeed for the following reasons:

The burden of establishing the need for a condition on expression is on the government, not only when the strict scrutiny test is used but even when the time, place and manner doctrine or *United States* v. *O'Brien* test is applied. *Clark* v. *Community for Creative Non-Violence*, 104 S. Ct. 3065, 3069-72 (1984); *Eastern Conn. Citizen Action Group* v. *Powers*, 723 F.2d 1050, 1055 (2d. Cir 1983); *New York City Unemployed & Welfare Council* v. *Breznoff*, 677 F.2d 232, 237, 240-41 (2d. Cir. 1982).

The history of this case reveals strong antipathy toward this group by city officials. The following testimony from the previous hearing for a Temporary Restraining Order in this case illustrates this:

RUSSO, pp. 35-36

> THE COURT: Would you, taking your time and using your own words, of course, tell me what the reason or reasons were that played a part in that decision I want to understand, in as great detail as you can explain to me, what the reasons for the rejection of the permit were.

THE WITNESS: Okay. For the past four years that I have been aware of this event, and my predecessors who were involved in it directly have told me, this group is very difficult to deal with. They're dishonorable. What this means is when, for example, we ask for a clean-up bond of $1000 or $2000 for an event that's going to take place on Saturday, somebody comes at 8:00 Friday night with a bag full of dollar bills and change that is far short of the clean-up bond.

Year after year, we've had difficulty with the sound. One year, it was reported to me that there was a performance that took place that was called slam dancing, where people got up on the stage and punched each other and kicked each other and fought and raised a crowd. One year, I was told a police detail had to be brought in because there was a dispute over turning the sound off.

Additionally, the city persists in its belief that because part of plaintiff's event consists of music, traditional free speech rights are somehow not relevant. This is clearly contrary to the law. *Cinevision Corp.* v. *City of Burbank*, 745 F.2d 560, 569-70 (9th Cir. 1984).

Russo-direct, pp.14, 10-16

THE WITNESS: Well, the Parks Dept.,—I represent the Parks Dept.—we don't feel we should abridge anybody's right to speak for as long as they can reasonably do that without disturbing anybody else. But I think that music is different, that that can annoy other people. I know that it sometimes annoys other people, any kind of music.

Not only do the new "permit rules" continue this misconception, but by suggesting a general ban on music after 6:00pm except the opera, they reveal their clear "cultural" bias.

Surely the government can show no compelling state interest in requiring a group protesting government policy to pay a thousand dollars each day to use a sound company selected by the city,

when that group owns its own sound system. The "mixing board" for a sound system of the size in question allows literally thousands of separate adjustments to the quality, volume, and tone of each instrument, speaker or device inputted into the system. To place this control in the hands of the government presents infinite opportunity for abuse.

Where First Amendment rights are implicated, compelling state interest must be "unrelated to the suppression of free expression", *Young* v. *American Mini Theatres*, 427 U.S. 50, 79-80 (1976) (Powell, J. concurring).

> "Above all else, the First Amendment means that government has not power to restrict expression because of its message, its ideas, its subject matter, or its content. To permit the continued building of our politics and culture, and to assure self-fulfillment for each individual, our people are guaranteed the right to express any thought, free from government censorship in content control."
> *Police Dept. of Chicago* v. *Mosley*, 408 U.S. 92, 95-96 (1971).

Only proof of a clear and present danger is compelling:

> "[I]n order to restrict speech, the State must show that the speech is used in such circumstances and [is] of such a nature as to create a clear and present danger that [it] will bring about the substantive evils that [the State] has a right to prevent'."
> *California* v. *LaRue*, 409, U.S. 109, 131 (1972) (Marshall, J. dissenting on other grounds).

The restrictions on distributing leaflets, displaying banners, posters, and accepting donations, cannot possibly survive constitutional challenge. *Lovell* v. *City of Griffin*, 303, U.S. 444 (1938).

Since the city does not require bicyclists, roller skaters, joggers or frisbee players to insure themselves or provide a clean-up bond, it is unfair to require those who enter the park to engage in activities protected by the First Amendment to insure themselves

or provide a cleanup bond before entering the park. The First Amendment protects not only speech, but also assembly. *NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886, (1982).

III-Balance of Injuries and Public Interest

The balance of injuries is in favor of the plaintiffs, and the public interest would be served by granting the injunction. To deny the injunction means that plaintiffs will either have to forego or diminish their demonstration, or face prosecution and incarceration if they persist as some plan to do. Defendants have little at risk compared to plaintiffs, especially in light of the limited duration of a Temporary Restraining Order.

First Amendment freedoms are the most cherished by our people. The public has a strong interest in upholding the First Amendment, and any preliminary ruling, especially where it would cause no harm to the government, should err on the side of upholding these freedoms.

Because plaintiffs have shown that they will suffer irreparable harm and are likely to succeed on the merits, and that the balance of injuries and the public interest is in their favor, they request that this Court grant a Temporary Restraining Order against enforcement of the regulations as applied to their demonstration.

s/James H. Fosbinder

JAMES H. FOSBINDER

Fosbinder & Walker
1053 Williamson Street
Madison, WI 53703
(608) 257-5517

s/Peter J. Avenia

GOMBINER & AVENIA
177 Prince Street
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(212) 677-1006

(Local Counsel)

Joint Exhibit 1 Submitted in Evidence on March 24, 1987

Appendix to the United States Court of Appeals for the Second Circuit: Affidavit of Christie Robb, Read in Support of the Application for Injunctive Relief

AFFIDAVIT
85 Civ 3000 (CSH)

I, Christy Robb, do hereby depose and say that

on February 26, 1986, at approximately 3:45, Joe Killian called me to tell me that he was the new program director for the bandshell in Central Park. He had been hired January 26, and his first task was to create specific guidelines for use of the bandshell. He had written these and was waiting for approval from the Commissioner. He was extremely vague as to how this new system would work. I reminded him of the "system" in the past and he said he "hoped to be able to respond to applicants within two weeks". I asked him how this transition in Parks Dept. format would affect my event this May, and he said all permits filed under Special Events "would be honored". I tried to ascertain what exactly that meant. I was unable to get any clear answer as to what the differences would be in terms of the permit. On approximately April 1st, 1986, I received a "new permit application". This new permit requires us to use a sound system selected and controlled by the Parks Department, requires us to agree not to display any banners or posters, to refrain from the sale of any literature or the solicitation of any donations, to pay approximately $800.00 (8 x $100.00/hr.) to the sound company selected by the city, forbids us from going past 6:00 pm, requires a $50.00 to $100.00 application fee, requires a cleanup bond, and may require us to provide liability insurance.

The purpose of our organization is to provide quality sound for a variety of organizations and groups with which we identify.

Affidavit of Christie Robb, Read in Support of the Application for Injunctive Relief

In addition to preventing us from providing our own sound at our annual event, this system would prevent us from providing sound services (for far less than $100.00/hr.) for a variety of other groups which have used the bandshell in the past. The effect of these new permit rules would be to render much of what we have worked for pointless. I believe that that is the goal of these new regulations.

s/ Christy Robb
CHRISTY ROBB
organizer of RAR events

Joint Exhibit 1 Submitted in Evidence on March 24, 1987

Appendix to the United States Court of Appeals for the Second Circuit: Annexed to the Affidavit of Christie Robb- Use Guidelines for the Naumberg Bandshell in Central Park

City of New York
Parks & Recreation

The Arsenal
Central Park
New York, New York 10021

Henry J. Stern
Commissioner

Elizabeth Barlow
Central Park Administrator

March 21, 1986

USE GUIDELINES FOR THE NAUMBURG BANDSHELL IN CENTRAL PARK

The Naumburg Bandshell is located in the heart of Central Park. The Concert Ground and Bandshell are between the Mall and Bethesda Terrace, with easy access to 72nd St. and Fifth Ave. Concerts and performances have been an integral part of this area since the original bandstand was built in 1862.

Central Park is in the midst of a large scale program of restoration and improvement of park management. All of the work is being done with careful consideration both of its use as a neighborhood park for millions of New Yorkers, and as major tourist attraction. The Parks Department has adopted the following guidelines for the Bandshell to assist outside sponsors of events in understanding their responsibilities; to prevent overuse, crowding, security problems and excessive noise; and to avoid conflicts with other users of Central Park.

Remember that because there is such a wide range of interest in using the Bandshell there are bound to be scheduling and permit

conflicts. On an average June weekend more than 100,000 neighbors come to Central Park. Many come for passive recreation away from the City; for many, the Park is an oasis to walk in, sleep, fly a kite, meet friends, or read.

Most potential problems can be avoided by thoroughly reviewing these guidelines and the guidelines of the Parks Department Special Events Permit. These Bandshell guidelines may, in some instances, amend and supersede the Special Events Guidelines.

If your proposed event does not meet these guidelines, consider using an alternate site. Throughout New York City there are underutilized parks and bandshells. Many communities would welcome a performance or special event.

PERMITS

Sponsors planning to use the Naumburg Bandshell must obtain the following permits:

1) *Special Event Permit*-Available from: Bandshell Program Director. There is a non-refundable processing fee, minimum $50, maximum $100. A cleanup bond must also be posted. A liability may be necessary.

2) *Central Park Bandshell Permit*-Available from: Bandshell Program Director, The Arsenal Rm. 103, 830 Fifth Ave., N.Y., N.Y. 10021. The Department of Parks and Recreation is the sole and only provider of sound amplification. A user fee of $100 per performance hour, plus a one hour sound check is charged. This fee is due within seven days of receipt of a signed Bandshell Permit. It must be payed with a certified check or money order (no personal checks or cash) made payable to Cultural Council Foundation/Concert Fund.

3) *Vehicle Permits*-Available from: Bandshell Program Director (SEE ABOVE). There is no fee for vehicle permits.

4) *Concessions Permit*-Available from: Concessions Office, The Arsenal, Rm. 405, 830 Fifth Ave., N.Y., N.Y. 10021. Information: (212) 360-8153.

Permits are non-transferable and non-assignable.

Permits (Originals Only) must be in possession of the person designated on the Bandshell Permit. This person and persons named as responsible for cleanup must be present for the entire event.

HOURS/DATES OF USE

Hours of use may vary depending on the type and anticipated size of the event. Most performing arts events can be permitted for two hours, with a maximum of two hours pre-performance set up and maximum of two hours break down.

Festivals and multiple performance events can be permitted for a maximum of six hours, with a maximum of two hours pre-performance set up and maximum of two hours break. Festivals may be permitted between 12:00 P.M. and 6 P.M.. In deference to nearby residential neighbors and Park users who enjoy quiet mornings, sound amplification is permitted only after 12:00 P.M.. This may be waived in certain cases of children's theatre and acoustic music. Evening performances are permitted under certain circumstances. Evening events must be finished by 9:30 P.M.. Sponsors must be prepared to provide their own stage lighting. All light specifications must be attached to the Bandshell permit. Sponsors are limited to the exact times listed on the Bandshell permit. The Department of Parks and Recreation will not extend or amend these times due to technical problems, late arrivals, parking difficulties, audience demand, or weather conditions.

Rain dates will be allocated at the sole discretion of Department of Parks and Recreation.

ATTENDANCE

The Concert Ground and Bandshell are located on a major circulation route between the Mall/Sheep Meadow and the Lake/Bethesda Terrace/72nd St. Crossover road. Seasonally, this area attracts more visitors than any other area in Central Park. To keep this route open and accessible without overflowing to the Mall, Terrace or the Pergola, the Bandshell/Concert Ground can accommodate a maximum of 3,000 people at any event.

If the sponsor or the Bandshell Program Director anticipates more than 3,000 an alternative site must be considered. For a program to be effective, manageable, and with proper security the crowd size must be limited to the above figure.

SOUND AMPLIFICATION

To provide the best sound for all events Department of Parks and Recreation has leased a sound amplification system designed for the specific demands of the Central Park Bandshell. To insure appropriate sound quality balanced with respect for nearby residential neighbors and the mayorally decreed quiet zone of Sheep Meadow, all sponsors may use only the Department of Parks and Recreation sound system. DEPARTMENT OF PARKS AND RECREATION IS TO BE THE SOLE AND ONLY PROVIDER OF SOUND AMPLIFICATION, INCLUDING THOUGH NOT LIMITED TO AMPLIFIERS, SPEAKERS, MONITORS, MICROPHONES, AND PROCESSORS.

Clarity of sound results from a combination of amplification equipment and a sound technician's familiarity and proficiency with that system. Department of Parks and Recreation will employ a professional sound technician will be fully versed in sound bounce patterns, daily air currents, and sound skipping within the Park. The sound technician must also consider the Bandshell's proximity to Sheep Meadow, activities at Bethesda Terrace, and

the New York City Department of Environmental Protection recommendations.

INSURANCE

Many events are required to have in effect at all times insurance in the amount stated on the Special Event Permit. The City must be named as additional insured on liability and property damage policies. The City must be the sole party insured on the fire and extended coverage policy. The insurance companies must be licensed to do business in New York. Even though a sponsor may have insurance, the sponsor is still personally responsible for any claims made by an employee or member of the public against the sponsor or the City arising from the use of the Bandshell. The sponsor must repay the City any costs incurred due to such claims.

DISPLAY AND DISTRIBUTION OF LITERATURE

Sponsors may not distribute, post, display, or affix handbills, flyers, posters, flags or banners. Sponsors may distribute a program for the event.

VEHICLES

Vehicles must have permits. Permitted vehicles may arrive a maximum of two hours pre-performance and depart a maximum of two hours post-performance. Upon arrival at the Bandshell vehicles are given one hour to unload. The vehicles may then be parked at 76th Street closed road. No vehicles of any kind may be parked at the Bandshell, Concert Ground or adjacent areas during an event or performance. After the event, vehicles may load for a maximum of one hour.

The Bandshell Program Director will advise the sponsor of any races or parades which must be taken into consideration in determining delivery and pick-up times.

CONCESSION OF GOODS

Any event staged strictly for advertising and promotion purposes is not allowed. Sponsors wishing to sell items related to the event must have a Concessions Permit. The Department of Parks and Recreation retains the right to restrict the commercialization of the Bandshell and Concert Ground.

REVENUE

Sponsors and individuals may not solicit for funds and revenue within Central Park. The Department of Parks is the sole and only party allowed to collect contributions.

SAFETY

Public safety and safety of the park are crucial for a successful event. The New York Police Department and Department of Parks and Recreation Enforcement Patrols (PEP) will be in attendance at events as is deemed necessary. Out of concern for public safety the following are prohibited:

* Use of fire of any sort.
* Use of weapons and dangerous implements.
* Cooking grills, stoves, hibachis, and other portable ovens.
* Portable showmobiles, stages, and trailers.

PORTABLE TOILETS

For times when anticipated general park use level is high, meaning that nearby restrooms will already be heavily used, the sponsor may be required to provide one portable toilet for every 250 anticipated attendees. Vendor information can be obtained from the Bandshell Program Director.

A vendor should be chosen who can guarantee delivery the day of the event—not before (Saturday in the case of Sunday events),

and pick-up by noon the following day (Monday in the case of Saturday events). The sponsor is responsible for complying with these requirements so be forewarned to contract with reliable vendors.

All delivery vehicles must have vehicle permits.

CLEANUP

All sponsors expect and appreciate a clean, litter free stage and concert ground. Sponsors must be prepared to return the Concert Ground and Bandshell area to a clean, litter free state.

All sponsors must provide ample industrial weight (3 ply) plastic garbage bags and personnel to clean the Bandshell site. Sponsors must list on the permit application the name, phone number, and address of the person responsible for directing cleanup operations. This person must be identified to the Bandshell Program Director or his representative at the beginning of the event, and show proof of garbage bags. The stage and backstage areas must be swept clean. Department of Parks and Recreation is responsible to load and cart all bagged garbage.

EVALUATION

All events will be attended by a representative from Department of Parks and Recreation. Each event will be evaluated according to these Bandshell Guidelines and the Department of Parks and Recreation Special Events Guidelines. Specific attention will be paid to sound level, attendance, cleanup, and respect for Central Park and its users. Sponsors will also be provided with an evaluation form of the Department of Parks and Recreation's compliance with these guidelines.

FAILURE TO FOLLOW THESE GUIDELINES AS PROVEN BY EVALUATION AND DOCUMENTATION CAN RESULT IN FORFEITURE OF BOND, AND PROVIDE REASON TO DENY THE SPONSOR OR MAJOR RESPONSIBLE

PARTIES ANY AND ALL FUTURE BANDSHELL PERMIT APPLICATIONS.

For more information please call Joseph Killian, Program Director (212) 988-4460.

Joint Exhibit 1 Submitted in Evidence on March 24, 1987
Appendix To The United States Court of Appeals
for the Second Circuit:
Affidavit of Joseph Killian,
Read in Opposition to the Motion for Injunctive Relief
with Annexed Exhibits

REPRODUCED, *SUPRA*, ON PP. JA22–JA77

Joint Exhibit 1 Submitted in Evidence on March 24, 1987
Appendix To The United States Court of Appeals
for the Second Circuit:
Affidavit of Chad. A. Vignola,
Read in Opposition to the Motion for Injunctive Relief

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ROCK AGAINST RACISM,
Plaintiff,

- against -

HON. BENJAMIN R. WARD, in his official capacity as Police Commissioner for the City of New York, *et. al.*
Defendants.

AFFIDAVIT IN OPPOSITION TO PLAINTIFF'S MOTION FOR INJUNCTIVE RELIEF

85 Civ. 3000 (CSH)

STATE OF NEW YORK)
:SS:
COUNTY OF NEW YORK)

CHAD A. VIGNOLA, being duly sworn, deposes and says:

1. I am an Assistant Corporation Counsel in the office of FREDERICK A.O. SCHWARZ, JR., Corporation Counsel of the City of New York, attorney for the defendants in this action. I represented defendants in last year's proceedings brought by plaintiff Rock Against Racism ("RAR"). As such, I am fully familiar with the facts and circumstances of this action.

2. Plaintiff's memorandum of law in support of its motion for a preliminary injunction contains several misstatements, and distortions in its recounting both of last year's proceedings and of the issuance of the "USE GUIDELINES FOR THE NAUMBURG BANDSHELL IN CENTRAL PARK" ("Use Guidelines"). Plaintiff's counsel, James Fosbinder, was present at last year's proceedings, however, his signature on the memorandum

of law is not an assurance of the veracity of the statements contained therein. *See* Fed. R. Civ. P. 11.

3. For example, plaintiff states in its Application For A Temporary Restraining Order And Supporting Points And Authorities ("Plaintiff's Memorandum of Law"):

> Last year, 1985, following several days of testimony, the city dropped its requirement that the event be held at Randall or Ward Island. Subsequently various other requirements concerning control over the volume, the length of the event, the distribution and the amount of music versus speech, and hours of access for setting up, were dropped thus satisfying the plaintiff. The event went on as originally planned.

Plaintiff's Memorandum of Law at 1-2. These statements are false. Because the Court obviously was present for much of last year's discussions, I will not belabor the chronology which is as follows:

4. RAR served its Order To Show Cause papers on the City of New York on April 19, 1985, seeking an order requiring issuance of a permit to use the Bandshell for a concert/political rally from 9:00 a.m. to 9:00 p.m. The City filed its opposition papers on April 24, 1985, citing a history of plaintiff's flagrant violations of past agreements on sound levels, improper clean-up efforts, and recurring crowd control problems, in support of its decision to deny RAR use of the Bandshell, and its suggestion that Randalls Island or Ward's Island might be more appropriate alternative sites.

5. On April 25, 1985, no hearing was held, but the parties appeared before the Court. At the onset, Mr. Fosbinder asserted first that there could be no regulation whatsoever of a public forum such as the Bandshell, and second that any regulation of noise was constitutionally impermissible. Plaintiff ceased pursuit of either of these legal theories after defendants noted that regulation of public forums and sound levels had been sanctioned expressly by Supreme Court precedent. *See, e.g., United States* v. *Grace*, 461 U.S. 171, 177 (1983) (reasonable time place and manner restrictions constitutionally applied in a public forum); *Grayned* v. *City of Rockford*, 408 U.S. 104 (1972) (upholding noise ordinance); *Kovacs* v. *Cooper*, 336 U.S. 77 (1949) (upholding noise ordinance).

6. This Court, however, suggested that it might be in both parties' interest to attempt to reach an amicable resolution of the dispute. Accordingly, that evening defendants agreed to issue plaintiff an event permit for use of the Bandshell if RAR would agree to abide by all Parks' Department regulations, including the noise level restriction which it had violated in the past. The parties agreed that the only issue for resolution by the Court was the permissible decibel level. There had not been any hearing, or "several days' testimony", as plaintiff falsely states in its memorandum of law.

7. Similarly, all other requirements were not "dropped" as plaintiff claims. For instance, plaintiff sought performance time in its order to show cause papers of 9:00 a.m. to 9:00 p.m. The performance hours as fixed by the Stipulation of Partial Settlement ("Stipulation"), were restricted to noon to 6:00 p.m. as originally offered by defendants. Plaintiff also states that restrictions on volume also were dropped. Yet, in paragraph one of the Stipulation signed by plaintiff, plaintiff agreed: "The permit is subject to strict compliance with its terms and with all applicable Parks' Department Rules and Regulations, *including the regulation directed towards excessive noise* . . . ." (Emphasis added). Plaintiff agreed to a restriction on the number of vehicles permitted in the park, agreed to identify those vehicles in advance, agreed to post a clean-up bond and agreed to all other reasonable regulations on the use of the Bandshell. A copy of the Stipulation of Partial Settlement is annexed hereto as Exhibit "A" for the Court's convenience.

8. Although the Court indicated that it had misgivings about whether it was proper for the Court to set a decibel level, a hearing was held on that issue with Robert Russo, the then Assis-

tant Commissioner for Citywide Services, and Milton Schulman, an acknowledged expert in the area of measuring and analyzing sound, testifying on behalf of the Parks' Department. A copy of the complete transcript of the proceedings on April 26, 1985, before the Honorable Charles S. Haight ("Transcript"), is annexed hereto as Exhibit "B".

9. The prior year, 1984, at a meeting with Parks' Department officials, RAR had requested the setting of a specific permissible decibel level of sound for their concert performance. RAR claimed that a specific decibel level was necessary to ensure an "objective" measurement of "excessive sound" by the Parks' Department. Plaintiff's failure to abide by the subsequent agreement which they themselves had sought, was a principal reason for the initial denial of the Bandshell permit in 1985. During the course of last year's proceedings, however, plaintiff reversed itself, and stated that it no longer sought a specific decibel level of permissible sound emission. Indeed, it then claimed that such a restriction was improper.

10. As a result, the Department initially found itself attempting to establish a specific maximum decibel level. After discussions with one of its experts, Milton Schulman, (as well as his testimony), which revealed that the event-to-event variations of the numerous factors figuring into such a decibel setting made such a task neither simple nor warranted, the Department reconsidered its position. Parks decided not to seek a specified permissible decibel level, as long as plaintiff agreed to abide by the Parks' Department's usual noise regulation. Plaintiff agreed and the injunction proceeding was settled satisfactorily for both parties.

11. The entire matter was then placed on the suspense calendar because the Parks' Department had decided to amend its regulations to conform the regulatory language with the agency's practice and limiting construction. This decision to review the regulations was not a concession that the regulations, as framed, were unconstitutional. Part of the Court's first amendment con-

stitutional calculus is an evaluation of the implementing agency's interpretation and application of its rules. *See, e.g., Hoffman Estates* v. *Flipside, Hoffman Estates*, 455 U.S. 489, 503-504 (1982). The regulations as interpreted by the Parks' Department were constitutional. In any event, this issue has since become moot.

12. The proposed amendments to the regulations were finally approved by Commissioner Stern on or about March 19, 1986. A copy was hand delivered to plaintiff the next day, and the proposed amendments are currently undergoing the notice and publication requirements set forth in the City's Administrative Code. Plaintiff has yet to indicate its intention regarding its mooted 1985 complaint. By the instant motion, plaintiff now seeks to challenge the Use Guidelines which apply only to applications for use of the Bandshell.

13. First amendment rights are subject, as plaintiff must concede, to reasonable time, place, and manner restrictions. Regulations governing length and hours of the event, vehicle permits, permissible sound equipment, clean-up bonds, and liability insurance are time, place, and manner restrictions. As demonstrated in the annexed affidavit of Joseph Killian, the Use Guidelines survive constitutional challenge here because, *inter alia*, they further significant governmental interests. Mr. Killian was recently hired by the Parks' Department to fill the new position of Program Director for the Mall/Bandshell/Bethesda Terrace. In this capacity, Mr. Killian, who previously was both a performer and an independent consultant on special events' productions, researched, drafted, and revised the Use Guidelines now challenged by RAR. The Use Guidelines attempt to accommodate the interests—at times countervailing—of park users, nearby residents, and persons who wish to attend performance events in the park. While first amendment rights are obviously paramount, the guidelines strike a balance between the competing interests.

14. In addition to demonstrating the significant governmental interests underlying the challenged guidelines, Mr. Killian's affidavit, and the accompanying memorandum of law

illustrate that the regulations are content neutral—applying to all forms of speech—they are narrowly drawn, and they leave open ample channels of communication. Plaintiff's principal complaint appears to be that it is unhappy that it cannot use its own sound equipment. I am unaware of a constitutional right to use one's own sound equipment. Furthermore, because plaintiff may use the Bandshell on May 4, 1986, if its motion for injunctive relief is denied, it is difficult to perceive the irreparable injury that will result.

15. Citation to the first amendment is not a talisman entitling plaintiff to relief. The facts and the law both overwhelmingly indicate that plaintiff's claims are meritless. Accordingly, it is respectfully requested that plaintiff's motion for preliminary injunctive relief be denied. Then perhaps, plaintiff can focus upon is its stated goal: the expression of constitutionally protected speech. Defendants are ready to aid plaintiff in this endeavor in every reasonable way possible.

s/ Chad A. Vignola
CHAD A. VIGNOLA

Sworn to me before this
29th day of April, 1986

s/ Kay Donaghy
Notary Public

KAY DONAGHY
Notary Public, State of New York
No. 24-4827974
Qualified in Kings County
Commission Expires March 30, 1987

Joint Exhibit 1 Submitted In Evidence On March 24, 1987

Appendix to the United States Court of Appeals for the Second Circuit:
Exhibit A Annexed to the Affidavit of Chad A. Vignola—Stipulation for Partial Settlement

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ROCK AGAINST RACISM,
Plaintiff

- against -

HON. BENJAMIN R. WARD, in his official capacity as Police Commissioner for the City of New York, et. al.
Defendants.

STIPULATION OF PARTIAL SETTLEMENT

85 Civ. 3000 (CSH)

WHEREAS, plaintiff Rock Against Racism has applied to the City of New York Department of Parks and Recreation ("Department") for a permit to use the Central Park Bandshell (the "Bandshell"), located near 72nd Street and Central Park West, on Sunday, May 5, 1985, for a political event during which speeches will be made and music played; and

WHEREAS, since 1979 plaintiff has filed applications to stage similar events at the Bandshell, and pursuant to permits issued by the Department have staged such events; and

WHEREAS, on or about April 9, 1985, the Department denied plaintiff's permit application for use of the Bandshell and instead offered plaintiff the use of either Wards Island or Randalls Island; and

WHEREAS, the Department's decision to deny Rock Against Racism's 1985 permit application was based on alleged

recurring excessive noise at the prior concerts; alleged recurring post-event inadequate clean-up by Rock Against Racism at the prior concerts; alleged recurring problems with crowd control at prior concerts; and alleged recurring violations of other Rules and Regulations of the Department; and

WHEREAS, plaintiffs deny all allegations made in the fourth "**WHEREAS**" clause of this stipulation; and plaintiffs contend that the Department's Rules and Regulations are unconstitutional; and

WHEREAS, the Department believed that Rock Against Racism had failed to abide by past agreements to correct the repeated deficiencies; and

WHEREAS, Rock Against Racism has filed this law suit challenging the Department's refusal to grant them a permit to use the Bandshell area in 1985, and the parties being desirous of reaching an amicable resolution thereof;

IT IS HEREBY STIPULATED AND AGREED, by and between the undersigned attorneys for the parties hereto as follows:

1. The Department agrees to issue to Rock Against Racism a permit to use the Bandshell area for the purpose stated above on May 5, 1985. The permit is subject to strict compliance with its terms and with all applicable Parks Department Rules and Regulations, including the Regulation directed towards excessive noise, which shall be construed and enforced in conformity with applicable judicial interpretations of the definitions contained therein. . The event will consist of amplified music and speeches, during the hours from 12:00 noon to 6:00 p.m. on May 5, 1985.

2. At the concert, the sound level will be monitored by the City of New York Department of Environmental Protection (DEP) using LEQ decibel meter devices. Rock Against Racism shall be permitted to have one representative present while DEP monitors the sound level. The Rock Against Racism representative shall not interfere in any way with DEP's monitoring.

3. The plaintiffs will set up for the concert in accordance with guidelines including, but not limited to, the location and type of equipment to be used, as set out by the Parks Department. Rock Against Racism agrees to use its best efforts to transport its equipment, including the Rock Against Racism sound system, into the Park between the hours of 6:00 a.m. and 10:00 a.m. The Parks Department will allow the plaintiff adequate time before the scheduled event to set up and test the necessary equipment and will not unreasonably interfere with the set up of such equipment. The Department also will provide plaintiff with adequate time and equipment to clean up after the conclusion of the performance at 6:00 p.m.

4. Pursuant to Article II, §3(d) of the Parks Rules and Regulations, Rock Against Racism will be required to post an undertaking in the amount of $1000.00, no later than May 2, 1985. The parties understand that the permit is herein granted subject to revocation in the event that the undertaking is not timely paid in full.

5. The Department agrees to issue Rock Against Racism the following vehicle permits to bring vehicles into Central Park on May 5, 1985: permits for (1) ten vehicles making a total of eighteen maximum round trips; (2) one vehicle making a total of four maximum round trips; (3) one sound truck; and (4) one flat bed truck. Rock Against Racism agrees to use its best efforts to drive safely and to minimize the total number of vehicle trips through the park, and the Department agrees to use its best efforts to secure a parking spot for one Rock Against Racism emergency vehicle near 72nd Street and Fifth Avenue. No Rock Against Racism vehicle will permitted *to enter* after 5:00 p.m. on May 5, 1985

6. This Stipulation of Settlement shall be "So Ordered" by the Court.

7. This Stipulation shall be admissible in any future litigation between the parties.

Exhibit A Annexed to the Affidavit of Chad A. Vignola—
Stipulation for Partial Settlement

Dated: New York, New York
May , 1985

GOMBINER & AVENIA
Attorney for the Plaintiff
177 Prince Street
New York, N.Y. 10012
(212) 677-1006

BY: s/ Mark B. Gombiner
MARK B. GOMBINER

FREDERICK A. O. SCHWARZ, JR.
Corporation Counsel of the
City of New York
Attorney for Defendants
100 Church Street
New York, New York 10007
(212) 566-0745

BY: s/ Chad A. Vignola
CHAD A. VIGNOLA
Assistant Corporation Counsel

SO ORDERED: 5/1/85

s/ Charles S. Haight, Jr.
U.S.D.J.

Joint Exhibit 1 Submitted In Evidence On March 24, 1987

Appendix to the United States Court of Appeals for the Second Circuit:
Exhibit B Annexed to the Affidavit of Chad A. Vignola—
Transcript of the Proceedings on April 26, 1985

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ROCK AGAINST RACISM,
Plaintiff,

- against -

HON. BENJAMIN R. WARD, *et al.*,
Defendants.

85 Civ. 3000 (CSH)

April 26, 1985
2:40 p.m.

Before:

HON. CHARLES S. HAIGHT, JR.,
District Judge

APPEARANCES:

FOSBINDER, SCHACHTER, WALKER & WINKLER
Attorneys for Plaintiff
JAMES H. FOSBINDER
and by:
GOMBINER & AVENIA
Local Counsel
MARK B. GOMBINER
PETER AVENIA

OFFICE OF THE CORPORATION COUNSEL
OF THE CITY OF NEW YORK
Attorneys for Defendants
CHAD A. VIGNOLA
SUSAN R. ROSENBERG

(2) THE COURT: The record should reflect that I have met with counsel in the robing room and had an off-the-record discussion at spme length.

I think it right to tell the other spectators in the court who are interested in the case that the function of that discussion was to further explore the possibility of an amicable resolution of disputes at this time, and, if that should fail,—and for the present, at least, it has failed—to work out a further identification of the issues and the manner in which we will proceed in the case formally. So that is what we have been doing.

And we will now, in the present state of affairs, proceed formally, and I will ask the defendants to call their first witness.

MR. VIGNOLA: Your Honor, defendant calls Robert Russo.

ROBERT RUSSO, called as a witness on behalf of the defense, having been first duly sworn, testified as follows:

MR. VIGNOLA: May I proceed, your Honor?

THE COURT: Yes.

DIRECT EXAMINATION

BY MR. VIGNOLA:

Q. Mr. Russo, by whom are you presently employed?

A. By the New York City Department of Parks and (3) Recreation.

Q. And in what position are you employed?

A. My title is Assistant Parks Commissioner for Citywide Services.

Q. And how long have you held that position?

A. Approximately eighteen months.

Q. What are your duties and responsibilities in that position?

A. They are varied. I have several divisions of the agency under my control, everything from lifeguards to our technical services people, special events, our enforcement people, our security people, and a large chunk of the budget.

Q. And what position did you hold prior to becoming the Assistant Parks Commissioner?

A. I was head of the Urban Parks Service, which is part—in the Parks Department, which were the Rangers and the parks enforcement patrol and the communications in the department, radio communications.

Q. How long did you hold that position?

A. I have been in the department for four years. I had that position for about two of those years.

Q. And what were your duties and responsibilities in that position?

A. Again, they varied. But we were to enforce all (4) Parks rules and regulations with the Parks Enforcement Patrol. The Rangers, as you may know, got—have tours in the parks, guided tours. They take school children on tours of the parks. Environmental education. We also have communications division that I ran.

Q. Could you briefly tell the Court, Mr. Russo, what your educational background is?

A. Yes. I'm a graduate of Manhattan College, bachelor's degree, Liberal Arts. I have a master's degree.

Q. Excuse me. If I could interrupt. What year was the bachelor's?

A. 1967.

I have a degree from C.W. Post College, major in Criminal Justice, 1974, and some other postgraduate work.

Q. Mr. Russo, in your capacity as Assistant Parks Commissioner, do you become involved in various events that are staged in Central Park?

A. Yes, I do.

Q. How do you become involved in those?

A. Well, I was directly involved for the last three years or two and a half years in control of the events and the security of the events, from the Parks' point of view, for many events in the agency, literally hundreds. And since that time, I have been promoted, so I'm indirectly—there are people who had the job that I have—that I had.

(5) Q. What type of events are you talking about?

A. Everything from road races to philharmonic concerts.

Q. And do you have any regulations that apply to use of the park during these events?

A. Yes, we have many regulations that apply. We try to—The regulations are aimed at controlling the events, so that it's done safely,—essentially, that's it—and that people enjoy it.

Q. Specifically, are there any regulations with respect to the granting of permit applications?

A. Yes. We have regulations that have to do with time and place of the event, the site. Some events are more suitable for one

location than another. Time of day, time of year. Weather is a controlling factor also for us. And number of vehicles that are allowed. We try to get an estimate of the number of participants, so we know how many people we have to employ for clean-up and for security. So there are a broad range of conditions.

MR. VIGNOLA: If I may approach the witness, your Honor.

THE COURT: Yes.

(Defendants' Exhibit A was marked for identification)

Q. Mr. Russo, can you identify that exhibit?

(6) A. Yes. This is the Parks Department list of major special events that are conducted under the auspices of the Department of Parks on our property, essentially.

Q. Are you familiar with the preparation of that document?

A. Yes, I am.

MR. VIGNOLA: Your Honor, I offer Defendant's Exhibit A into evidence.

THE COURT: Show it to counsel.

MR. VIGNOLA: Yes, I'm sorry.

(Pause)

MR. GOMBINER: No objection.

THE COURT: Received.

(Defendant's Exhibit A was received into evidence)

Q. Mr. Russo, is that a complete list of all the activities in the park?

A. No, it's not. It is the major events that we—generally, the ones that we list are the ones that we know about in advance.

They are of some magnitude. They require our participation and some planning. There are hundreds of other smaller events that we don't list.

Q. In applying the rules and regulations to the various events that take place in Central Park, what factors do you take into account?

(7) A. I'm sorry?

Q. In applying the Parks Department's rules and regulations, for example, you talked about the time regulations. How do you determine what is an appropriate time to apply to a particular permit application?

THE COURT: Need we get into that, do you think? Is that a contested issue in this case? What I want to do is focus, in the limited amount of time we have, only upon—

MR. VIGNOLA: I'm sorry, your Honor.

Q. Are there noise regulations with respect to the granting of permit applications?

A. Yes, there are.

Q. And do those noise regulations apply to all events in Central Park?

A. They do apply to all events, yes, for amplified music.

Q. And in applying those regulations to particular events, what considerations do you have to take into account?

A. What we take into account is, again—you mentioned the time of day. That's important. We take into account the size of the crowd, how far the level of the music or the sound has to reach or is expected to reach.

Those are the kinds of things we take into effect—into consideration.

Q. When you say that you take into account the size (8) of the crowd, how does the size of the crowd vary the loudness of the noise?

A. Well, for example, if you have a major concert, let's say, on the Great Lawn in Central Park, you would need more amplification for that than you would in the Band Shell, because you may have 100,000 people. So naturally, for a philharmonic, you would need larger speakers, have some speakers set up around the lawn. And some concerts, we have done that and focus those speakers in on the crowd rather than the perimeter. So the people in the area can hear, but you don't necessarily hear on Central Park West or Fifth Avnue or other places.

Q. And how does the time of day vary?

A. Well, we try to give consideration to people who live around the park, because every single week, just about, from now on, we will have some kind of event in the park. And we get constant complaints—it's not just with this group, by no means—all the time about people trying to relax, trying to read the paper. Sound seems to carry up to a lot of these tall buildings. So we even get complaints about the road runners with their bullhorns at nine o'clock. So we try to manage those things so that they're not—so that you can enjoy living around the neighborhood, that you're not annoyed every single weekend.

Q. And how do other events in the park impact on (9) your decision?

A. Well, I'll be very specific. In the Band Shell, there are areas very near the Band Shell that we have set up what we call passive recreation, such as the Sheep Meadow. It's about a thirteen-acre plot of land. People sun themselves, read books, sit down. There is no organized—there are no organized sports allowed in that area. That is about three or four hundred yards from the Band Shell. It's southwest. And loud performances from the Band Shell would affect the Sheep Meadow. It is akin to

somebody sitting down next to you when you're trying to take a nap with a loud radio.

Q. Well, if I could back up a minute. Are there musical events that are held in other areas of the park?

A. Yes, primarily the Great Lawn. There are small grass concerts that are held at the Dairy. There is an overhang, what is called a loggia, outside the Dairy building. And they have little combos that perform there in that area.

The Band Shell, the Great Lawn for the big concerts. There's more room.

Those are the principal areas where we have concerts in Central Park.

Q. Are those places the same distance the Sheep Meadow is to the Band Shell?

A. No, they're not. The Dairy is a little bit (10) further, and it's actually east of the—it may be a couple of blocks away.

The Great Lawn begins at 79th Street. So the Band Shell is approximately 72nd Street. So that's about seven blocks away.

Q. Now, concerts that are held at the Great Lawn, which way does the music face, if you understand my question?

A. It faces west, because the Band Shell, which is acoustic, by the way, in and of itself faces west.

Q. I'm sorry?

A. The BandShell is sometimes used by groups without amplification, because it is an acoustic band shell. It was designed to amplify sound.

Q. If you were to hold a concert at the Great Lawn, which way would the music be?

A. Faces north, generally north.

Q. If I could direct your attention to May 5th, 1985, the upcoming May 5th, do you know what events are scheduled for that day in Central Park?

A. The ones that are known to me are right on the perimeter of the park will be a rally for Soviet Jewry at 64th and Fifth Avenue. There are a lot of people that assemble each year, I think.

There is a jazz concert at the Dairy.

And there is a bike-a-thon, cerebral palsy (11) bike-a-thon, where people come at 8:00 o'clock in the morning, and they bike and you sponsor them for how many miles they do around the park.

Q. And on any given weekend, are there a wide variety of events?

A. Every weekend from now on, you have a large list of events. We have a very busy weekend coming up, for example.

MR. VIGNOLA: Your Honor, if I could have one moment.

THE COURT: Yes.

(Pause)

MR. VIGNOLA: If I could just have a few more questions, your Honor.

THE COURT: Surely.

Q. Mr. Russo, are you familiar with Rock Against Racism's permit application?

A. Yes.

Q. And what area is that to use?

A. I'm sorry?

Q. And what area did they apply to use?

A. They applied to use the Band Shell area, Central Park.

Q. Do you know how many hours they have requested to use the Band Shell area for?

(12) A. I believe it is six.

Q. And what hours?

A. I shouldn't say—May I change that? It's six hours.

THE COURT: All we are concerned with is the truth, if that will assist you.

A. (Continuing) The performance is six hours, but the time that they need to use it, I think, is from 6:00 in the morning to 6:00 at night, because there is setup time starting early in the morning.

Q. And does the Parks Department have any regulations that apply to the timing of events in Central Park?

A. What we try to do is, when we have concerts, musical concerts, we keep them to appoximately two hours. That is something that we have done with, I think, all of the concerts that I have been involved in, musical concerts.

This is somewhat different.

There are other events, where we have religious ceremony, and there is a mass involved, for example, and sometimes that goes longer, because it's co-celebrated, and we have more hours with that. But it's not just music. There may be some singing with it.

THE COURT: As you understand Rock Against Racism's application for next May 5th, you said six hours of performance is requested?

(13) THE WITNESS: Yes, your Honor.

THE COURT: Which hours are those?

THE WITNESS: From noon to 6:00.

THE COURT: Noon to 6:00. All right. Thank you.

Q. What is the reason that you have time restrictions imposed on permit applications?

A. Several.

One is that the Band Shell is used—That area is rather large. It is used by a lot of people. We try to give people an opportunity to use the area and not to isolate it for many, many hours. There are a lot of spontaneous groups that perform there without amplification.

There comes a time when any music, no matter what your taste is, after several hours, it becomes—it begins to be a bit much. So we try to limit performances, all the performances, because there are hundreds—it's been estimated there are 250,000 people that use the park on a Saturday or Sunday when the weather is good.

What we try to manage is that everybody has a good time, that we don't interfere with one another's taste.

Q. And in doing that, did you request that the Rock Against Racism participants use the Band Shell area for music purposes for less than the full six hours?

A. I am requesting that the music part of the performance, it would be a good idea and not unreasonable, (14) that that be collapsed somewhat. If someone wants to speak with amplification, you don't need the kind of amplification or the kind of sound that you get with music. It appears to me to be a difference.

MR. GOMBINER: Judge, I'm going to object to what appears to Mr. Russo.

THE COURT: Well, what are your reasons for saying that? May be more than sheer appearance. Why did you say what you just said?

THE WITNESS: Well, the Parks Department,—I represent the Parks Department—we don't feel we should abridge anybody's right to speak for as long as they can reasonably do that without disturbing anybody else. But I think that music is different, that that can annoy other people. I know that it sometimes annoys other people, any kind of music.

Q. Well, has the Parks Department ever gotten complaints from people for use of the park for music purposes?

A. Oh, yeah, we get complaints all the time.

Q. Now, why does the Parks Department seek to have 6:00 o'clock cut-off of the Band Shell use?

A. I think because that's the time of day that it begins—people go home to have dinner, it begins to get dark. And it seems reasonable that if you're having a (15) performance, 6:00 is a reasonable time. You have to stop somewhere, and we think that that is fairly reasonable, and everybody is happy with that.

MR. GOMBINER: Objection to what everybody is happy with.

THE COURT: I will disregard the last phrase.

Q. Are there any clean-up requirements at these concerts?

A. What we do is, we try the best of our ability, if the group doesn't clean up or they post a bond,—we usually get help from a lot of groups—we try to get the park cleaned up on that tour. Our people go off at 11:00 o'clock. So they'll come in right after an event and clean up till 11:00. That's important to us, because it costs us men if it comes—have to have another crew come on. So we try to do it in a few hours so the park is clean the next day.

MR. VIGNOLA: I have no further questions at this time, your Honor.

THE COURT: All right, cross-examination of this witness.

MR. FOSBINDER: Thank you, your Honor.

CROSS EXAMINATION:

BY MR. FOSBINDER:

Q. Mr. Russo, when did you deny the permit to Rock (16) Against Racism?

A. I believe it was a couple of weeks ago in April. April 9th or 10th.

Q. You spoke with me on the telephone; is that right?

A. I don't know who you are.

Q. Fosbinder.

I'm sorry. My name is James Fosbinder.

A. No, I don't believe I spoke to you.

Q. Our recollections differ.

A. Might have been Sheldon Horowitz.

Q. You're right.

A. He's the permit person for the Borough of Manhattan.

Q. You denied the permit two weeks ago; is that right?

A. The agency did.

Q. When was the permit application filed?

A. I think in January, but I'm not certain.

Q. Why did it take so long to decide to turn it down?

A. We have thousands of permit applications. That's the best answer I can give you.

Q. Surely, you're aware that people put a lot of time and effort into these events. This was an ongoing (17) struggle of some

seven years, it's been occurring here. And yet you waited until two weeks because of the press of other permits. That was the only—

MR. VIGNOLA: Objection, your Honor.

THE COURT: I sustain the objection to the form. It is argument.

MR. FOSBINDER: Yes. Excuse me.

Q. Can you tell me what sort or written standards you used to turn down this application?

A. We have Parks rules and regulations, and there is a section in there—

Q. What section?

A. The number of it escapes me, but it has to do with sound, amplified music.

Q. And specifically, how was that relevant?

A. I'm sorry?

Q. Specifically, how did that tell you to turn down this application?

A. It tells you that level of sound that is excessive can be regulated, essentially. That's a paraphrase of what is there.

Q. Can you describe this regulation process to me in a little more detail?

A. I can describe what we did last year, and maybe that will get to the heart of the matter.

(18) Q. All right, what did you do last year?

A. Since there was a history, which is in dispute of confrontation between this agency and this group, we had a meeting in the Central Park Precinct with the members of this group. And we decided that representatives from the Parks Department and the

Police Department and the group would agree upon a sound level that would be sufficient so that you could hear the performance to the rear of the Band Shell, which is a large area, couple of—

Q. Could you explain what you mean by "hear" it?

A. If you stood in the back, you could hear the music from the Band Shell.

Q. Just hear? Nothing beyond "hear"? What sort of decibel level? Do you have any—

A. Well, there was a representative from that group. I wasn't present, but there was a representative from the group and three representatives, essentially, and somebody from the Department of Environmental Protection and they agreed to a decibel level.

Q. What would have happened if they didn't agree to—

A. So it was a mutual agreement. They listened, and they agreed to that.

Q. What would have happened if they didn't agree to that decibel level?

(19) A. I don't know. I can't conjecture.

Q. Okay.

A. It was—

THE COURT: Wait for the next question.

THE WITNESS: Sorry.

Q. You've said that one of the problems was that this event was monitored and they exceeded this allegedly agreed to level.

Can you tell me, are all events monitored in Central Park?

A. Yes. Any event that we have a person at, we monitor the sound level in a number of ways. We have people there. We

have—We listen. If people come up and complain to us, we respond to that and we will listen.

Q. And the decibel level is always the same?

A. We ask people to lower the sound. We don't measure with meters. This was something unique, and we had a past history, and we said, "Let's do it scientifically."

Q. So previously, you hadn't had decibel readings?

A. Not to my knowledge, we hadn't done that.

Q. What standard did you use?

A. An agreement between two people that it's excessive, that you don't need sound to go two blocks beyond where your event is being staged.

Q. So prior—

(20) A. That's the kind of agreement.

Q. Prior to this agreement, you used a standard which was not scientifically determined?

A. That's correct.

Q. So this was the first time that anyone would have had—

A. That I know of.

Q. Was this the first time that anyone would have had the opportunity who didn't personally own a decibel meter to know what sound level meant what at that location?

A. As far as I know.

Q. Okay. Did you have anything to do with approving, for instance, the Diana Ross concert?

A. Some. I was involved in it, yes. I was involved at that time in the security, from the Parks' point of view, which, essentially,

we control the backstage area, the safety line that is maintained in the middle of the event that size, and access to the stage and backstage. That was my role at the time.

Q. Did you have anything to do with setting the volume level for that event?

A. No.

Q. Are there—To change the topic here for a moment, are there areas in Central Park which have traditionally been used for gatherings for protests, demonstrations, (21) similar events?

A. I would say yeah, principally the Band Shell is a place, because it is a place where you can stand. There is no grass in there. It is hexagonal. And there is seats there, around—it's a semicircle, and there are some seats where people can sit and listen. So I would say that that, and, of course, Grand Army Plaza, which is just outside of the park, is a place where people make speeches.

I don't know that it's designated as such, but it has happened over the years.

Q. Now, I'm a little puzzled. You said that the reason this group wouldn't be allowed to play after—4:00 o'clock, as I understand, is what you're asking for now; is that correct?

A. Yes.

Q. —4:00 o'clock, was because people—it's a residential area near there, and it could be disturbing to people?

A. No, that's not what I said. You must have misunderstood me.

What I was suggesting was that our policy is that most concerts are about two hours, an hour and a half or two hours. And those people seem to pay attention. They enjoy, and then they go elsewhere, and other people can pass through without having to work their way through a crowd. (22) And that's been a reasonable policy. We haven't had problems with other groups on that.

And this group has now six hours. And what I'm asking is, why not, if the music and the sound level of music is a problem, it is a problem for us, why not cut the music portion to four hours, so that at 4:00 o'clock, the music stops, but you still have amplified voice, and you can continue with speeches. It is longer than other performances.

Q. Is the time of day any problem? Is there no problem with going later at night? Are there events held at night? Let me ask you that.

A. No, not generally. There is some runs that are held in the nighttime, but not musical performances.

Q. In the schedule which you've given us, there will be opera performed at the Band Shell between 7:30 and 10:30 at night.

A. You're right, there is the grand opera. There are three performances. I'm sorry.

Q. Does that require sound amplification equipment?

A. Yes, they do.

Q. And what sort of standard would that be held to?

A. We don't—If you're asking whether we measure decibel levels, we don't.

Q. Not for opera?

A. The performance isn't very loud, though. It (23) reaches to the back of the Band Shell.

Q. Are you—

A. There are people that don't like opera who complain to us, if that's what you're asking.

Q. Yes, that certainly is one of the points I was getting at.

But you have made no arrangements whatsoever for this group to monitor their sound level?

A. Last year, not—

Q. No,—

A. Oh, you said this group.

Q. Yet there were complaints made?

A. And they quiet down if there are complaints. You know, we ask people to quiet down the sound, and they do it.

We have a group that tends to get loud in June called the San Juan Fiesta, and we ask them, and they turn it down if we request them.

Q. Does it seem possible to you that many more of the residents of Central Park West appreciate opera than hard core punk music?

A. I don't know.

Q. You have no idea?

A. I don't know. I've never taken a survey.

Q. You don't know the tastes—

(24) A. It's the sound level. Has nothing to do with the taste of the community.

Q. How do you determine something is so loud?

A. Are you asking if the—

Q. I'm asking how you determine whether or not something was too loud. How do you determine whether the opera was too loud?

A. If we get complaints from people.

Q. And how can you differentiate whether these people are complaining because it's to loud or because they don't like it?

A. We don't.

Q. You said that every week, events generate complaints about noise, including running events. Is that correct?

A. Yes. Announcements about the runs, sometimes the sound gets very, very loud, and it's early in the morning. And that's why time is very important. What doesn't disturb you at noon might disturb you at 8:00 or 9:00 o'clock in the morning.

Q. But not between 7:30 and 10:30 when the opera is allowed to play, that's not a critical time.

MR. VIGNOLA: Objection.

MR. FOSBINDER: Yes, I'm asking a question.

THE COURT: Rephrase it.

(25) Q. Do you experience more complaints about music events held at night than during the day?

A. Well, firstly, no, I would say not. Either because of the nature of the event, or the fact that we don't have that many at night.

Q. But you have no way of telling which reason?

A. No.

Q. You've indicated, and the papers filed have indicated, a problem with clean-up for this group, and that this is somehow relevant to the determination of the permit application. Is that correct?

MR. VIGNOLA: Objection.

THE COURT: I am not sure that is what the witness said. Why don't you rephrase it and ask him whether or not.

Q. Have there been problems with this group cleaning up after their performance?

A. I am informed of that. I haven't got firsthand knowledge of that.

Q. Can you tell me why all of their bond is given back every year if that was the case?

A. I can't explain that.

MR. FOSBINDER: All right, let me confer with counsel, if I may.

THE COURT: Yes.

(Pause)

(26) MR. GOMBINER: Your Honor, with the Court's permission, may I inquire of the witness, or would you prefer that one—

THE COURT: I will permit it on this one occasion, but the practice that I usually follow and will do from this point on is to require that one counsel or the other handle a witness. I do not usually permit—

MR. GOMBINER: Well, Judge, I'll give the questions to Mr. Fosbinder.

THE COURT: That is better. Let's stick to that rule and regulation, yes.

(Pause)

Q. I call to your attention a rule, as I understand it, of the Parks rules and regulations, Number 3, Subsection D.

MR. FOSBINDER: May I approach the witness?

THE COURT: Yes.

We had better get the rules in evidence and make them a formal part of the record.

MR. FOSBINDER: I can do that while he refreshes his recollection.

(Plaintiff's Exhibit 1 was marked for identification)

MR. FOSBINDER: Do you have a copy?

THE COURT: You offer those, do you, Mr. Fosbinder?

(27) MR. FOSBINDER: What?

THE COURT: You offer the rules?

MR. FOSBINDER: Yes, I offer—

THE COURT: Any objection to the offer of the rules?

MR. VIGNOLA: No objection.

THE COURT: I receive the rules in evidence, Plaintiff's Exhibit 1.

(Plaintiff's Exhibit 1 was received into evidence)

Q. Is it not a fact that you—Is it a fact that you are required to issue a permit unless—

And I've got to find it again.

(Pause)

Q. Let me read the correct language. I can't find it right now. It states: "Upon application, the Commissioner shall issue a permit, unless the proposed event will present a clear and present danger to the public health or safety."

MR. VIGNOLA: Objection, your Honor. That's not the entire section.

THE COURT: No, that is true, for the sake of the record.

MR. FOSBINDER: That's correct. "Proposed event will substantially interfere with the use and enjoyment of (28) the park by the public."

Is there another section that you call relevant?

MR. VIGNOLA: Yes, 2 and 4. I'm sorry. Not 4. 2 and 3.

THE COURT: Well, rather having colloquy of counsel, if you want to ask this witness what provisions of the the rules he relied upon in denying this permit, that is what I am interested in.

Q. All right, what section did you rely upon?

A. Can I look at it?

Q. Yes.

MR. FOSBINDER: If I may approach the witness?

THE COURT: Yes.

A. Thank You.

(Pause)

A. 1-D-1.

Q. Which reads?

A. "The proposed event would substantially interfere with the use and enjoyment of the park by the public."

Q. Wouldn't, for instance, the Diana Ross concert interfere a great deal more?

MR. VIGNOLA: Objection, your Honor.

Q. Would—I'm sorry—Would—

MR. VIGNOLA: If I may, this is all irrelevant. We have gone beyond the point of the denial of the permit.

(29) My understanding was, we were discussing the noise regulation. It all seems irrelevant at this juncture.

THE COURT: I do not think so. It may go to an argument that plaintiffs may offer that as the stated reason to protest. I will permit the inquiry.

MR. FOSBINDER: Thank you.

A. Could you say that again?

Q. Would an event, such as the Diana Ross concert, which attracts a great deal more people and uses a sound system much larger, interfere more with the use by other people seeking a quiet place to go?

A. It's two hours, as opposed to six hours. It's not just a matter of sound. It's a matter of length of time that it interferes.

Q. For what period of time, during the Diana Ross concert, were the people in the park?

A. The performance was an hour and thirty minutes. And probably about two hours, two hours and a half.

Q. And why was that event ended, rain?

A. It was a storm, and it was dangerous, so—

Q. So what length of time would that even have drawn a large crowd to the park, it it had not been for the bad weather, in your experience?

A. Oh, the event, it was still an hour and thirty minutes. It was scheduled for an hour and thirty minutes. (30) That was live on TV.

Q. Let me ask another question.

How long before that event did the crowd begin to gather?

A. Probably an hour or two. Probably two hours before.

MR. FOSBINDER: Okay, I think that's all, your Honor.

THE COURT: All right. Redirect?

MR. VIGNOLA: Yes. Thank you, your Honor.

REDIRECT EXAMINATION

BY MR. VIGNOLA:

Q. Mr. Russo, were you—

MR. VIGNOLA: Excuse me. Withdrawn.

Q. Do you know whether the clean-up bond was, in fact, defaulted in 1980 for Rock Against Racism?

A. I don't know the answer to that.

Q. Why don't you know the answer to that?

A. Because I wasn't in the Parks Department in 1980.

Q. Do you know if the Department of Environmental Protection monitors sound level at any event?

A. The only one that I can recollect is the Rock Against Racism event of last year, because it was agreed that that happen.

Q. Do you know whether the agreed to decibel level (31) was communicated to Rock Against Racism at that time in 1984?

A. People have told me that there were at least—

MR. FOSBINDER: Objection.

A. I don't know directly. I was not there. I was told by people who worked for me that Race Against Racism—

MR. FOSBINDER: Objection.

THE COURT: Yes. I will not consider the answer.

Q. Do you know how many people were at the Diana Ross concert, approximately?

A. Two to three hundred thousand, I'd say.

Q. Do you know approximately how many people were at the Rock Against Racism concert?

A. Two thousand.

Q. What time of day was the Diana Ross concert?

A. It was—began at 6:00, 6:00 p.m.

Q. And what other events were scheduled for that evening in the park?

A. Which evening?

Q. I'm sorry. For the night of the Diana Ross concert, were there any other events scheduled in Central Park that you're aware of?

A. I don't think so. None that I am aware of. I would doubt that there would be any.

Q. Do you know what the cost would be to measure with a decibel meter the sound level at every event in Central (32) Park in a year?

A. I have no idea. There are at least 200 events. They are all not musical, however. But I suppose it would be considerable.

Q. Are there other factors, besides complaints by residents, that you take into account in determining what might be excessive noise at a given event?

A. Well, I had mentioned previously, we have—we sometimes get complaints by people who live around the park. We get complaints by people who just want to sit down and who are passing through the park or using the park. That kind of stuff.

MR. VIGNOLA: I have no further questions, your Honor.

THE COURT: Anything further from plaintiff?

MR. FOSBINDER: Yes, your Honor.

RECROSS-EXAMINATION

BY MR. FOSBINDER:

Q. How many people complained about Rock Against Racism last year?

A. I don't know.

Q. Do you have any idea?

None. All right.

Can you describe the complaint-taking procedure at all?

(33) A. Well, calls generally. The complaints generally go into the Central Park Precinct Station House. It's usually where people call in the first instance. And then there is a person at the switchboard who takes the complaint and notifies somebody who is in a patrol sector to respond, "A complaint of noise."

Q. Do you know if the majority of complaints are anonymous or whether the people identify themselves?

A. It's probably about fifty-fifty. Some people will give their names, others don't.

Q. Do you have any way of telling whether the people who don't identify themselves are simply calling up again and again or are separate people?

A. No. I don't have any way.

MR. FOSBINDER: Okay. Thank you.

Excuse me.

(Pause)

Q. Do you have any knowledge of anyone who was using the park last year complaining about the sound levels of Rock Against Racism?

A. I have been told. Direct knowledge, no.

MR. FOSBINDER: Thank you.

MR. VIGNOLA: One more question.

THE COURT: Sure.

MR. VIGNOLA: Thank you.

(34) REDIRECT EXAMINATION

BY MR. VIGNOLA:

Q. Mr. Russo, in determining whether to refuse the Rock Against Racism permit this year, was that based on your understanding that Rock Against Racism had refused to abide by an agreement last year as to a set decibel level?

A. Primarily, yes.

Q. Were there other considerations?

A. Yes. We—

THE WITNESS: Can I go on?

THE COURT: You may.

A. There was—I knew of a history of problems in this permit procedure with this group. I thought we could solve it by sitting down and agreeing on something for last year, and we did that in advance of the event, and we granted the permit. And it looked like it was going to work out, and it was breached again. And that's why we're here.

MR. VIGNOLA: I have no further questions, your Honor.

THE COURT: This is going to require you to repeat yourself a bit, Mr. Russo, but I am going to put the question to you again, anyway, to make sure I understand your position completely.

The present group, Rock Against Racism, applied (35) to have a concert or an event at the Band Shell sometime in January; is that so?

THE WITNESS: Yes, your Honor, I believe it was January.

THE COURT: Right. And had this group used that particular area, the Band Shell area, on prior years?

THE WITNESS: Yes, your Honor.

THE COURT: Do you know for how many prior years?

THE WITNESS: I think for at least five or six years.

THE COURT: And then a time came in mid-April when this permit was refused; is that right?

THE WITNESS: That's right.

THE COURT: Do you know, of your own personal knowledge, why that permit was refused?

THE WITNESS: Yes, your Honor.

THE COURT: Would you, taking your time and using your own words, of course, tell me what the reason or reasons were that played a part in that decision? I want to understand, in as great detail as you can explain to me, what the reasons for the rejection of the permit were.

THE WITNESS: Okay. For the past four years that I have been aware of this event, and my predecessors who were involved in it directly have told me, this group is very difficult to deal with. They're dishonorable.

(36) What that means is when, for example, we ask for a clean-up bond of $1,000 or $2,000 for an event that's going to take place on Saturday, somebody comes at 8:00 o'clock Friday night with a bagfull of dollar bills and change that is far short of the clean-up bond.

Year after year, we've had difficulty with the sound. One year, it was reported to me that there was a performance that took place that was called slam dancing, where people got up on the stage and punched each other and kicked each other and fought and raised a crowd.

One year, I was told a police detail had to be brought in because there was a dispute over turning the sound off. And the people who run the event, who tried at one point to turn if off, could not control their own constituents, so the police had to be called in.

Last year, I decided that I would try to sit down with the people and come to an agreement as to the event, so we could manage it well. The buck had to stop somewhere. We tried to do that.

I feel that the group did not live up to the agreement. They had to be given summonses. They had vehicles in the park that they weren't supposed to have, unregistered vehicles.

It is very dangerous on a Saturday or any week day to have vehicles driving around the park.

(37) They refused to turn the sound down, and I believe they agreed to a certain decibel level.

And my conclusion was that no matter what we did, that they were not going to cooperate with us, even when they agreed to cooperate with us and we thought that they were satisfied. I think it's a very difficult group to control, and I don't know why.

So the decision was made, for all those reasons, not to issue a permit. And then we relented and said that we might be able to control this better on Randall's Island or Ward's Island, because you don't have these large surrounding crowds then, and it's more private, a private place. That was turned down, and we're here.

THE COURT: Have you, to the best of your ability, described for me all of the factors which were in your mind at the time you arrived at this decision?

THE WITNESS: I think so, your Honor.

THE COURT: All right. Counsel may inquire further if they wish.

All right, Mr. Russo. Thank you. You may step down.

(Witness excused)

MR. VIGNOLA: Defendant calls Mr. Milton Schulman to the stand.

MILTON SCHULMAN, called as a witness on behalf (38) of the defense, having been first duly sworn, testified as follows:

MR. VIGNOLA: May I proceed, your Honor?

THE COURT: Yes.

DIRECT EXAMINATION

BY MR. VIGNOLA:

Q. Mr. Schulman, by whom are you presently employed?

A. I am employed by the Department of Environmental Protection. In particular, it's the Division—the Department of Air Resources, Division of Noise Abatement.

Q. And in what position are you presently employed?

A. My line is a psysicist, parenthesis, (electronics)

Q. How long have you held that position?

A. Approximately six years.

Q. And what are your duties and responsibilities in that position?

A. My main duty is to measure noise, to analyze noise, write specifications on noise, computerize our equipment in order to analyze noise more specifically, to do noise contours within the City of New York so buildings can be adequately soundproofed.

Q. When you say "noise contour" studies, can you explain a little bit?

A. Well, noise contours, we measure noise levels (39) over a given period of time, say, twenty-four hours or so. And from a knowledge of the noise levels, the sound energy in the area, we can specify the type of soundproofing, window construction the building should have.

Q. And do any of your duties include enforcement of New York City's noise control?

A. Our division is not an inspection division. There are times, though, that engineers are needed to go out and do sound level measurements. Basically, these are tape recordings which give us a permanent history of the measurement, rather than a simple sound level meter, where the measurement is seen and that's it.

From these measurements, we do certain analyses. We have certain codes to go by. And we do take these things into environmental courts and civil courts.

Q. What position did you hold prior to becoming a physicist for the Department of Environmental Protection?

A. I was an assistant electrical engineer.

Q. And who was your employer?

A. Same people, the same department.

Q. Mr. Schulman, could you briefly tell the Court what your educational background is?

A. I'm a graduate of Polythechnical Institute of Brooklyn. RCA Institutes was a course in advanced technology. I also attended a one-year Naval Aviation electronic training (40) program. I also had a four-week course on noise at City College.

And we've had a number of courses by manufacturers of noise equipment, the use and measurement techniques of this equipment.

Q. Have you ever done any teaching in the noise measurement area?

A. I have recently, from approximately a year ago, conducted a three-day seminar for our Inspection Department. And we did give a course on the physics of noise and the use of noise measuring equipment.

Q. In your capacity as a physicist, do you ever get involved, yourself, in measuring sound levels?

A. Yes, we do. Yes, I do.

Q. Does that include both indoors and outdoors?

A. We do both indoor and outdoor measurements, yes.

Q. On how many occasions would you estimate that you've measured sound levels indoors?

A. Approximately a hundred times over a thirteen-year period.

Q. And about how many events would you estimate that you've measured the sound level at that occurred outdoors?

A. Approximately forty to fifty times.

Q. Did any of these events include musical events?

(41) A. We did answer complaints on musical events, too.

THE COURT: Hold on just a minute, please.

(Pause)

MR. VIGNOLA: May I proceed again?

THE COURT: Yes. Please.

MR. VIGNOLA: Your Honor, at this time, I would like to move to have Mr. Schulman as an expert on sound.

THE COURT: Questions on voir dire?

MR. GOMBINER: Yes, your Honor.

VOIR DIRE EXAMINATION

BY MR. GOMBINER:

Q. Mr. Schulman, what is the RCA Institute?

A. RCA Institutes, which I attended from approximately 1950 to '54, basically was a course in advanced electronics. We did have a course on loud speakers, how they function, design of loud speakers, things like that.

Q. And was that program conducted by the Radio Corporation of America?

A. At that time, yes, it was.

Q. Mr. Schulman, are you a member of any societies of acoustical engineers?

A. No, I'm not.

Q. Do you consider yourself to be an acoustical engineer?

A. I consider myself to be an acoustical consultant, (42) capable of measuring, analyzing noise, recommending soundproofing; a little bit of psycho-acoustics, how a change in noise level affects people, how a change in noise level determines loudness, what increases in noise level can do to people, how they can annoy people, disturb them.

Q. In regards to how noise can annoy or disturb people, have you taken any courses in that area?

A. Most of the courses—There are very few courses in that. There is a lot of literature on this, and a lot of statistics on noise

levels above a given level which would annoy and disturb people. These statistics were arrived at by experts in the field of audiology.

Q. Are you, yourself, familiar with those statistics?

A. Yes, we do use them and we continually read them. The Federal Government uses them. We do use all these guidelines.

Q. And have you read any of that literature, yourself?

A. Yes, I have.

MR. GOMBINER: We have no objection to Mr. Schulman being qualified as an expert.

THE COURT: Yes, I accept him as an expert in the designated field, which is precisely what, Mr. Vignola?

MR. VIGNOLA: The measuring and analyzing of sound.

(43) THE COURT: The measuring and analyzing of sound. I will accept him as an expert in that field.

DIRECT EXAMINATION

BY MR. VIGNOLA: (Continued)

Q. Mr. Schulman, if you could explain to the Court, by what procedure do you measure sound at outdoor events?

A. At outdoor events, we can either use peak sound pressure levels, average levels, the percent of time noise is exceeded for a certain given time.

What we could also use is the LEQ level. And this basically is the sound energy content of the noise measured over a given time period.

Q. When you say the "sound energy" level, is there any way you can explain that a little more simpler?

A. As you know, noise is a random varying signal. It can go high, can be periods of quiet. Noise levels change. The amplitudes continually change.

You can replace the sound energy of that random varying signal by a continuous signal having the same energy content as this random varying signal. This continuous signal which we can use to replace the random changing signal is defined as the LEQ. It's actually a sound energy measurement associated with a given time period. It could be one second, it could be 465 days.

Q. And how do you calculate an LEQ?

(44) A. The LEQ basically is a mathematical calculation. You actually sum up the area underneath the curve, divide by the base, and you get an average level. This can be done today with meters, with equipment,—

Q. If I could interrupt.

A. —with computers.

Q. Does that number that you arrive at have a specific measure? Is that called decibels, in other words?

A. The units of measurement, it's called decibels. Normally, it's A weighted in nature. A weighted decibels means that the sound, the instrument, itself, has the same human response as the—frequency response as the human ear.

Q. Now, you stated that you could measure and arrive at this decibel number by use of an LEQ meter.

A. Right.

Q. Does the Department of Environmental Protection have such meters?

A. In the last four or five years, rather than using our tape recorders and then going into the lab and using computers, meters have been purchased that can measure the LEQ period of time, the LEQ reading of the noise in a given area.

Q. And measuring noise, do you ever have to determine a concept known as loudness?

A. Loudness is a concept that cannot be measured (45) by any meter. There is no way of measuring loudness with any meter, any device. It's actually a subjective interpretation by a human being. There are levels of loudness.

Before I go into that, a sound level meter only measures sound pressure. It does not measure loudness. Whatever kind of sound level meter that's used, whether a simple sound level meter, an LEQ meter, it's strictly sound pressure.

Loudness, it has been determined, can be measured—Well, there's been a lot of research by people in this field. It so happens that a ten-decibel change in sound pressure, ten-decibel, which is a physically measurable quantity, subjectively would sound twice as loud to you. A twenty-decibel change would be four times as loud to you.

It has been arrived at by people in this field actually subjecting people to certain signal levels, increasing that level and, through statistics—and using people with fairly normal hearing, this statistic was arrived at, and it is a recognized statistic in the field.

THE COURT: But even there, there is a subjective element, isn't there, Mr. Schulman?

THE WITNESS: Loudness—

THE COURT: I mean, you're depending on a person to say, "That sounds two times as loud to me."

THE WITNESS: That's right.

(46) Well, this you have to understand. This has been done through statistics. If you subject thousands of people to this experiment and all that, you can fairly and accurately derive, with some confidence, the level that is statistically valid.

It's done in a lot of fields of psychology and a lot of science. The use of statics is the only thing we actually have to use when we can't measure something physically.

Q. Now, Mr. Schulman, did there come a time when you became involved in measuring the sound level at a Rock Against Racism concert at the Band Shell?

A. Yes. We were called in. I think my supervisor asked me if we would help the Police Department take these measurements.

Q. Do you remember approximately when that was?

A. Approximately about a year ago or so.

Q. Do you recall at what time you arrived at the Band Shell at that time?

A. We arrived somewhere between 10:00, 11:00 o'clock in the morning. And there was a reason why we arrived that early.

Q. Why was that?

A. Well, we did—my partner and I, we did walk around the park and get some idea of the average noise levels (47) in various areas of the park prior. This would be called the ambient or general background noise levels in the park.

Q. Do you remember approximately what that ambient noise level was?

A. It varied anywhere from 55 DBA to 60, 62 DBA.

THE COURT: In various areas of the park, 55—

What did you say?

THE WITNESS: To 60, 62 decibels.

THE COURT: Thank you.

Q. Now, from what point had you decided to measure the sound level at the Rock Against Racism concert?

A. We selected a point approximately twenty-five, thirty feet behind the audience, which was approximately the perimeter of the people listening to this concert.

We did monitor it at that time at that point. It was approximately 250 or 300 feet from the Band Shell, possibly less.

Q. Why did you choose that point?

A. Well, we chose that point in order to make sure that the people who are listening to this can adequately hear this sound without being disturbed by other sounds in the park, the levels would be high enough for their listening pleasure; at the same time, people who are using that park wouldn't be disturbed by the noise, or there would be no intrusive noise.

(48) Also, from a quick calculation, the New York City Noise Control Code has what you call ambient noise quality levels at residential property lines. And we felt by having this level selected at the perimeter of that location, our ambient noise quality zones at these residential property lines would be met. In other words, everyone would be happy.

Q. And what equipment did you use to measure the sound level?

A. We basically used an LEQ meter.

Q. And what does that LEQ meter measure?

A. Again, that LEQ meter measures the average—

Let's talk about that, the average sound level over a period of time.

We did select three-minute intervals to measure that sound level. And we tried to keep that level around 75, 77, 78, around there.

Q. Well, if an LEQ meter gave you a reading of 75,—

A. Yeah.

Q. —does that mean that the noise level was 75 throughout the three-minute period?

A. That means that that sound energy over that two- or three-minute period of measurement can be replaced with a continuous pure tone or some sound that isn't random in nature, having the same sound energy as the random varying (49) signal we were listening to. The peaked levels can well exceed 75 DBA.

Q. And they could also be lower?

A. And they could also be lower than 75 DBA.

It's like taking a group of numbers, 50, 60, 70, 80, 90, and taking the average. There are numbers above that level, and there are numbers below that level.

Q. Was there a maximum decibel level set for the Rock Against Racism concert?

A. At that time, the Police Department—we decided that something between 75 and 78—really, it was around that level—would be more than sufficient for people within the audience to enjoy the concert and for people outside the perimeter of that park not to be disturbed by the sounds.

As we move from the perimeter toward the Band Shell, the sound levels or that LEQ level would increase. If we went half the distance, we would get approximately a four-to-five decibel increase in that sound energy. It would be 80, 85 in the center.

Q. Do you ever measure the LEQ decibel level from directly in front of the stage?

A. No, because first of all, there are problems with that. You want to get at a normally—

All these measurements in the sound field are (50) done at a residential property line, at some perimeter, a certain given distance away from the sound source.

If you move right into a sound source and take measurements, you can have problems with that measurement if you try to extrapolate it, say, to 100 or 200 feet away.

Most of the codes, in fact, a distance is specified from a sound source for that measurement.

Q. Now, you stated that you measured the sound level from the edge of the Band Shell area, approximately?

A. It was approximately—It was a walking path, and we were in front of that walking path. We were about twenty-five to thirty feet in back of the audience. I estimate the distance from the Band Shell was approximately 250 feet, something like that.

Q. So how many decibels above the ambient level did you estimate that the 75 ceiling would be?

A. It was approximately 15 to 17, 18 decibels above the ambient, which is equivalent to a sound source about—better than twice as loud as compared to the existing noise level.

THE COURT: Are you describing what you've just said?

THE WITNESS: Yeah.

THE COURT: Calculation that you were making before any music was playing?

(51) THE WITNESS: We saw that the ambient was 60 decibels.

THE COURT: Yes, you told me that.

THE WITNESS: We then measured—We then said, "Well, we have to increase—have some increase in loudness in the levels which would mask the noise in the park and yet enable the people to hear this sound."

We do know, and it's in all books, that a ten-decibel change in sound pressure is equivalent to increasing the loudness of a signal by twice. We went above that. We went to fifteen decibels.

It just isn't a straight ratio, and we felt a fifteen- or eighteen-decibel increase at the perimeter of that Band Shell would be sufficient for people to enjoy the concert.

Again, as we move in toward that Band Shell, as we approach the noise source, the sound levels, the sound energy, the LEQ level would increase.

THE COURT: So your 75 to 78 calculation was based upon your finding as to the ambient sound level, and your calculation of what in those circumstances should be sufficient for the audience.

THE WITNESS: Yes. In order for the noise level not to be intrusive to the people in the park and also to meet our New York City Noise Control Code at the Central Park (52) West property line, residential property line.

THE COURT: Well, what is the Code's provision in respect of the residential property line?

THE WITNESS: It was residential property line—And I haven't checks this, but Central Park West would be declared as a high density residential land use zone. The LEQ level would be 65 DBA as a daytime standard. That is, between the hours of 7:00 a.m. and 10:00 p.m. That was one of the guidelines we used, or standards.

We also did use another guideline and this is what we call a City Environmental Regulation. It is a guideline where we state that for parks—that we do classify a park as acceptable, marginally acceptable, marginally unacceptable. We require that outdoor areas—

We first measure the ambient. And if the so-called L-10 level for the worst hour, or for ten percent of the time, the noise level is 55 DBA or less, we would state that park is classified that the general noise exposure level for the park as acceptable. That is the ambient.

Central Park, that L-10 is pretty close to that ambient.

In addition, this guideline states that any new activity in the park shall not increase that ambient level by more than 3 DBA in that area. We use this as a guideline.

The levels we used at the Central Park concert (53) are much, much higher than that.

THE COURT: Okay.

MR. VIGNOLA: May I proceed, your Honor?

THE COURT: Yes.

BY MR. VIGNOLA:

Q. At the point at which you were measuring the sound level, what was behind you?

A. Behind us was a walking path at that time; people walking; there were also some radios playing.

Q. Was there anything that would absorb the noise?

A. Well, trees, the earth, there is some absorption factor in the noise. But you could have a hundred-foot thicket of trees that may reduce the noise level maybe a few decibels. It isn't the best absorber of sound going, contrary to what people think.

Q. If I told you that a concert measured an average of about 115, an LEQ of 115, four feet in front of the stage, could you tell what the LEQ would be at the perimeter of, say, the Band Shell?

A. It would be a rough estimation, because your nearest sound source, doubling the distance, if it's a point source—In other words, if the sound source, if the distance is much greater than the sound source, itself you have an attenuation of 60 DBA for doubling the distance.

If you're, say, along—if you're very close (54) to the sound source, there may be 3 DBA.

In order to calculate this, it would be kind of difficult. But if I had to give an estimate, it would be in the 90's, between 85 and 90 at that distance, if we had an LEQ of 115 near the stage.

Another thing, an LEQ of 115 near the stage, I wouldn't want to measure that level in the first place. The peak levels would defi-

nitely approach 110, 115 decibels, 120 decibels. It would be very loud. That is extremely loud as a sound energy level, 115. We're not talking about peak, but sound energy.

Q. Well, what can the peak be under those circumstances?

A. The peak, depending how frequently it occurs, since the average is 115, more than likely, the peak well exceeds 115. It's like the average of any two numbers.

Q. Is there a level at which an LEQ level is considered dangerous?

A. Well, in OSHA standards,—this is for working people—and LEQ level exceeding 85 DBA over an eight-hour period, it's recommended that these levels not be exceeded.

In the long term, if you're subjected to this level for a long period of time,—and don't ask me how long—it can affect your hearing.

If you're in a level of 115, say, 90, 100 decibel (55) LEQ level, the short period of time,—example, a person going to a disco continually—in the long run,—he possibly first will have a threshold shift in his level. In the long run, he may have permanent damage to his hearing.

I don't think we're talking about damage criteria here.

Q. Now, Mr. Schulman, have you ever measured the sound level at any other outdoor events?

A. Well, at the Forest Hills Tennis Club, we did measure the sound levels there at some concert.

Q. What type of concert?

A. This was some sort of group. It was a rock group, or something like that. We did measure the levels in accordance with the New York City Noise Control Code at a residential property line.

Q. And what was the maximum permissible LEQ level there?

A. Well, since there was a low density residential zone, the maximum permissible level after, say, 10:00 p.m. at night would be 50 decibels.

Q. What about before 10:00 p.m.?

A. 60 decibels.

Q. Have you ever measured the LEQ level at any other events?

A. Well, there used to be the Schaeffer Sound—(56) Schaeffer Festivals in Central Park. There were a number of complaints from residents on Central Park West, and we did establish in '76 some measurement procedure in order to control these noise levels.

Q. Were sound measurements actually made?

A. At that time, we didn't have—the department didn't have any LEQ measurements. We used the simple sound level meter. And we watched the meter for thirty seconds, and we said, "Well, the level can't exceed more than 90—more than 80." And then we let a minute go by. And then we said we'd measure another thirty seconds.

It was a very cumbersome way of controlling the noise levels at the Schaeffer concert. But we were able to do it. The techniques available today, it's much simpler to monitor these levels.

Q. Well, more precisely, what were the restrictions placed on the Schaeffer Festival?

A. I have a copy of it. During any one-minute measurement interval, the meter reading shall not exceed 80 DBA for more than thirty seconds.

Q. Now, is that a peak level?

A. Yes, it's a peak level for more than thirty seconds. You'd actually have to watch that level for thirty seconds. It can't exceed 80 DBA. The meter reading shall not—Also, the meter reading shall not exceed 95 DBA (57) at any time. That means at any instant of time, that meter shouldn't be above 95 DBA.

Q. Now, if an LEQ measured a reading of 75 or 80,—

A. Yeah.

Q. —hypothetically, for a thiree-minute period, could the peaks go above?

A. Yes. 80—

Q. Could it go above 95?

A. The LEQ is very dependent upon peak noise levels. In other words, it can go, say, to 80 three or four times during that period. It may—It can only go once possibly to 95, because that peak—the peak level actually determines the sound energy that you're measuring.

Q. Do your determinations on acceptable sound level vary depending on what type of music is played?

A. No, no.

Q. Well, do you know what raggae music is?

A. I have an idea what raggae is.

Q. Well, assuming that music was played that had a greater base element in it, would that music tend to have a higher LEQ level or lower LEQ level or the same?

A. You really can't tell. Base sounds well below—base is in the area around 50, 60, 40 cycles attenuated by this meter. The meter is what you call A weighted. So peak levels are attenuated tremendously by these sounds. Although (58) base sounds are annoying, a lot depends on the level of the base you're playing.

Q. Well, would there be any difference, in your opinion, on the acceptable LEQ level between raggae and, say, rock and roll?

A. We would use our same measure. I would apply the same measurement technique.

Q. Do you know how many people were present at the Rock Against Racism concert last year, approximately?

A. If I had to estimate it, I would say it was only four or five hundred, or possibly less.

Q. Mr. Schulman, why are not decibel levels set for concerts in the park?

A. Well, it's very difficult. Because first of all, you'd have to look at the location and see how close it is to some noise sensitive zone, a hospital or residential development, or how much of the park use is used for other activity, and all that. It would be very difficult to specify for every park and for every concert a given level, without taking into account the conditions associated with the park: the basic background ambient, how much of the park is used for other forms of enjoyment,—may only be used to sit around—how close is the park to a hospital, things like that. It would be difficult to specify a level on this for these parks.

(59) MR. VIGNOLA: May I have one moment, your Honor?

THE COURT: Yes.

MR. VIGNOLA: Thank You.

(Pause)

MR. VIGNOLA: I have no further questions at this time, your Honor.

THE COURT: All right.

CROSS-EXAMINATION

BY MR. GOMBINER:

Q. Mr. Schulman, what time did you determine the ambient level for Central Park last year?

A. We got there sometime—most—The park levels were determined well before 11:00 a.m.

Q. Were they determined, say, at 9:00 a.m.?

A. No, we got there after 9:00 a.m.

Q. And do you know how many people were in the park at that time?

A. There were people in the park. I could not tell you how many people were in the park area.

Q. When you determined the ambient level, did you in any way control for the possibility that there might be more people in the park at, say, 2:00 o'clock than at 10:00 o'clock?

A. Well, if you—I'll give you an example how this energy level changed.

(60) If a group of people are talking, and you double the group of people talking at the same level, the ambient level would only increase three decibels. A three-decibel change in energy is a lot. The ambient level at that time, you're correct, will basically determine by the amount of people in the park, the activities, radios, and all that.

But within that bandstand area, there was—there were people walking around, but no one was shouting. There were radios playing. The ambient was between 55 and 60 decibels.

Q. And did you measure this ambient, initial ambient level at the Band Shell?

A. Yes, we can measure the ambient any place.

Q. No. Did you? Where did you measure it?

A. No, we measured it around the perimeter, basically, and other areas of the park, up to Central Park West, and all that, within the park area.

Q. And when you measured ambient level around the perimeter, there wasn't a crowd there listening to a concert, was there?

A. At that time, the nature—the definition of "ambient" is the basic sound energy level in the area without the sound source operating. The concert wasn't on at all.

Q. Well, a crowd gives rise to some noise, too, doesn't it?

(61) A. Ordinary conversation would be about 60, 62, 63 DBA.

Q. What about a crowd of people listening to rock music? Would they give rise to some sound?

A. Yes, they would affect that ambient and all that. They would.

Q. A sound meter can differentiate between the sound of a crowd and the sound coming from amplified instruments?

A. No. All it does is measure the sound energy level in the area, from both near and far sources. It doesn't tell us—the sound meter can't tell you—it's not a tape recording—what the sound sources are. But it's a typical sound energy level in the area.

We could, if we all stayed quiet and we measured—or few of us were talking like now, and we took a measurement of the sound energy in this room, we would get a certain average level over a period of time. If we stopped talking, it would be lower.

The meter in this case won't differentiate, you know, the sound sources.

Q. You have no way, then, of being able to tell what degree of noise on your sound meter came from the crowd and what degree came from the instruments?

A. That really—

MR. VIGNOLA: Objection.

(62) A. —isn't really important. All we do know, that the average sound energy—increase in sound energy that we did allow was 15 decibels. We can't tell whether it was a horn or drum or anything else in the sound source from the concert, either. But it's that average sound energy we're interested in.

Q. All right. Now, you've testified that you determined in conjunction with the Police Department that an average level of 75 on the LEQ would be adequate for everyone to be happy.

A. Yes. I use the term "happy." It would be adequate for both the people in the audience to hear the concert, to hear it clearly, without any outside noise sources masking the concert level. As we approach the Band Shell, the sound energy levels increase. Simultaneously, people outside of that concert area won't be intruded upon or disturbed by these noise sources.

Q. Now, in terms of determining whether people in the audience could enjoy the sound, that's a subjective determination, isn't it?

A. Yes.

Q. I mean, you're familiar with the fact that certain sorts of noises can be heard at higher levels and still be pleasing to certain people's ears, as opposed to other sorts of noises?

(63) A. Yes.

Q. Do you ever ask anyone in the audience whether the sound seemed enjoyable to them?

A. No, sir.

Q. Do you ever ask anyone at the perimeter or outside the perimeter whether they're being disturbed by the noise?

A. Basically, our levels were decided strictly on experience, other literature governing the subject, and all that, what a ten-decibel increase in sound energy means, what a fifteen-decibel increase means, whether this is adequate for people to enjoy something, and also for people not to be disturbed by something. It's really a number that we try to balance.

We didn't take no poll or conduct any poll, as: "Is this too loud for you?" Or "Is this not loud enough for you?"

Q. When you were conducting this experiment, were you inside some vehicle, or were you standing on the road?

A. We were outside.

The microphone was an outdoor microphone. The microphone was mounted outside, outdoors.

Q. Were there other people there with you?

A. Yes.

The microphone, in fact, was about ten, fifteen—(64)ten feet or more above ground level. Any conversation in the immediate area wouldn't really affect that sound energy that amount.

Q. You didn't have any trouble talking to people you were with, did you?

A. No.

Q. Now, you've testified that the sound levels that you recorded were generally somewhere around 80 decibels. Is that correct?

A. The sound level or the sound energy level?

Q. The sound energy level.

A. Between 75 and 80.

Q. And that was at a distance of about 250 feet; is that correct?

A. Yes, approximately.

THE COURT: When did you make those measurements?

THE WITNESS: This was sometime last year in May, the last time this group was in the park.

THE COURT: So did a time come when, after making your ambient sound measurements, as you have described them, you went back and heard the concert actually in performance?

THE WITNESS: Yes, we did listen to it.

THE COURT: All right.

THE WITNESS: I wasn't there the whole time. I was there for a few hours.

(65) THE COURT: I do not think that has been developed in the testimony with sufficient detail. I want to hear about that, Mr. Schulman. Tell me—

Well, counsel can put some questions on the subject.

THE WITNESS: We did use—

Shall I defer?

THE COURT: Yes, just go ahead. Tell me what you did.

THE WITNESS: We did make measurements using—of the sound level using a metrosonics sound level meter. It's a model 306A.

We first measured the ambient level at that perimeter. We then started to measure the sound levels generated by the concert.

By the way, if a sound source increases by ten decibels, is above a ten-decibel level, the ambient level contributes nothing to that sound source, if it's 10 DBA or greater.

We did start to listen to the sound source emanating from the group playing. The levels were—the LEQ levels initially varied 88, 90. They were told to come down. I think we brought it down to the 80's and then into the 70's. We did try—the Police Department did try to control that level.

(66) Q. And you're testifying it did come down?

A. To around 75, 78.

Q. All right. Now, if the sound level was 75 to 78,—

A. The LEQ?

Q. The LEQ. Excuse me.

If that was 75 to 78 at 250 feet, could you tell us what it would be at 500 feet?

A. Pretty closely. Sound—Since it's about 75—Let's take the number 78 at 250 feet. Let's make the assumption a free field. It would be six decibels lower.

Q. And if it's about 72, that's about—

A. —66.

Q. Well, let's say—

A. Doubling the distance from the sound source.

Q. I'm saying if it is 72 at 500 feet, that would be approximately the sound of two people talking to each other?

A. No. I think normal conversation, if you're talking LEQ, is much lower than that. If you're talking peak levels, if I'm talking to you, I would just guess, it would be in the 60's.

There is a big difference between an instantaneous reading on a sound level meter where we're measuring sound pressure and where we're taking an LEQ measurement over a (67) period of time. That's not the same thing.

Our normal conversation, normal conversation between two people, the LEQ would be in the low 50's.

Q. Well, can you give me an example of what 72 would sound like, something else that it would sound like?

A. Okay. If you stayed on, say, Third Avenue, and you listened to the street noise, the average LEQ there would be between 72 and 75 decibels.

Q. So somebody 500 feet from the concert would experience approximately the same level of noise as someone who is standing at Third Avenue.

A. Pretty much so. Again, the important thing is to keep in mind the energy levels, the background levels in the park before the sound source started up.

Q. Do you have any idea what the average sound level in a discoteque is, where music is played?

A. Peak levels or energywise?

Q. Well, let's stick with energy levels.

A. Okay. If you were in the center of a disco, it would be between 90 and a 100 decibels, the sound energy, or possibly louder. It's pretty loud.

Q. Would you say the sound level 500 feet from this concert was pretty loud?

A. No, it isn't pretty loud. But what it did do, it increased you ambient more than ten decibels.

(68) Where a person is sitting in an environment of 60 decibels and suddenly there is a ten-decibel change in the ambient, he experiences something twice as loud. This can be annoying and disturbing.

It's as if you're sitting in your bedroom and suddenly an air conditioner is turned on. That could disturb you.

You're in an environment that's so much. If you get a ten-decibel change, you're going to notice that signal.

Q. Mr. Schulman, what you're really trying to tell us, that you arrived at these standards by taking—

A. I'm not arriving at a standard.

Q. You've testified that you and the Police Department determined that something between 75 and 78 would keep everybody happy. Correct?

A. Yes.

Q. And the way you arrived at that was by saying at 10:00 o'clock in the morning, the ambient is such-and-such, and we'll add on about ten to that. And therefore, anyone who is there at 10:00 in the morning—

A. We're adding more than ten. We're adding fifteen to eighteen. That's a tremendous increase.

Q. I know what you're adding.

A. A ten-decibel change in sound level is a ten-fold (69) change in sound energy, if that's more meaningful to you.

THE COURT: Say that again.

THE WITNESS: A ten-decibel change in LEQ is a ten-fold increase in sound energy. And that's quite an increase.

Again, it's a level that we determined that would be adequate for all concerned people.

THE COURT: You said, didn't you, that a ten-decibel change in LEQ is a ten-fold increase in—

THE WITNESS: In sound energy.

THE COURT: And also twice as, quote, "loud," unquote.

THE WITNESS: Twice as loud.

THE COURT: All right.

THE WITNESS: Again, loudness cannot be measured by any meter.

Q. And similarly, what sound level is annoying or disturbing can't be measured by any—

A. There is no meter—you're right—that will measure the degree of annoyance, the degree of disturbance.

There are a lot of statistics on it. And it would tell you that when sound levels at 70 decibels, a certain percentage of people are disturbed or complain about that noise. When there is a sudden increase five decibels, another percentage of people are increased—are disturbed (70) by it.

Again, there is some subjectivity to it. And this is about the only way you can deal with sound and loudness.

Q. Do you have any idea what the average LEQ level of an orchestra at Carnegie Hall would be?

A. I have no idea. I really don't.

First of all, it would depend upon the location. If I'm up close to the orchestra, it would be one level. As I move away, the sound energy level would decrease.

Q. Now, you've also testified that your determination as to what the appropriate sound level would be would not vary with the type of concert. Is that correct?

A. No, we would use that level whether it would be—if it were a symphony or rock group or raggae group. We would use that number.

Q. And the number you would use is not—Is the number you use, 75 to 78, is that the number you would use?

A. Around that figure.

Q. All right. How many other concerts have you been asked to measure at the Band Shell?

A. Well, I was never at the Band Shell in particular before. I was at the Wollman Rink when the Schaeffer Festivals were held.

At that time, as I stated, we used a different (71) method of measurement, since these meters weren't available, these LEQ meters.

We did measure the concert at the Forest Hills stadium. We had a code to go by there. The New York City Noise Control Code stated the levels that a given activity can emit or which can emanated at a residential property line.

In this case, we're dealing more than with a residential property line. We're dealing with people within a park, and then comes the residential property line.

Q. So in the last nine years, no one has ever asked you to measure the sound level at anything in Central Park; is that correct?

A. We—Well, the previous year, we did the—

Q. Other than the Rock Against Racism.

A. The last time we did some measurements there was in 1976, the Schaeffer Music Festival. At least, I did. I'm not aware—It's very possible that other people in my department did some measurements there. This, I'm not sure of.

Q. At least you were not asked to do anything in the last nine years.

A. No.

Q. When the Diana Ross concert took place, nobody asked you to be there; is that correct?

A. No.

(72) Q. Are you aware of the fact that WNEW holds a concert in Central Park every year?

A. Who?

Q. WNEW. It's a radio station.

A. Yes, I'm familiar with the radio—I'm not aware that they hold a concert every year.

Q. Are you aware that there are operas presented in the park?

A. Yes, I am aware of that. We have had complaints from people from operas, and all that, from people on Central Park West.

But what our department did do is, call the organizers of the concert. A lot of times, we got some voluntary compliance with it.

Q. But nobody ever instructed you to go to the opera and see—

A. No.

Q. —how loud it was.

A. No.

Q. And you don't, in fact, know if the opera is 75 to 78—

A. No.

Q. —or louder or softer.

A. No. At least, I don't know—I would imagine at the perimeter of the audience, the levels would be around (73) that level. I don't think it would be much higher.

Q. It could be somewhat higher, but you don't know.

A. First of all, these—more people attend these concerts. These are in the thousands of people. They extend out more

through the park. It's very possible that 250 feet at the same distance as we measured this group, the levels at an opera may be louder. But at the perimeter of the concert, it may be well within the levels we specified.

In any case, they would have to meet the ambient noise quality zone as they approach that residential property line as that concert moves out. That noise level, that standard, would apply.

Q. Well, what noise measurements did you take at the residential property line for this concert?

A. There was no need to take any measurements at the residential property line.

Q. You don't know, in fact, what the noise levels were.

A. We do know at the residential property line that the sound source was barely audible. We did have a fellow, Nerva Paul, one of our engineers, take a walk there and listen.

Q. And he could barely hear?

A. He could barely hear it.

MR. GOMBINER: No further questions.

MR. VIGNOLA: May I have a few questions, your (74) Honor?

THE COURT: Yes.

I am going to have to rise at 4:30. We will finish with this witness if we can. But if not, we will have to go forward.

Counsel have other witnesses in mind, in any event?

MR VIGNOLA: We don't have any further witnesses, your Honor.

THE COURT: How about the plaintiff?

MR GOMBINER: Your Honor, I think at the conclusion of their testimony, we might want to hear oral argument before we're

required to put on any witnesses. I'm not sure we're going to be obligated to call anyone. But we do have witnesses if the Court determines otherwise.

THE COURT: Well, I will have to rise at 4:30 and then go over until mid-morning or afternoon.

There is a criminal trial and selection of a jury which starts first thing on Monday morning.

But we will go for a few minutes and see where we get.

Go ahead.

REDIRECT EXAMINATION

BY MR. VIGNOLA:

Q. Do you know when Nerva Paul went to measure that (75) sound level?

A. Well, he did measure it while the concert was on.

Which sound level were you talking about, at the residential property line?

Q. At the residential property line.

A. While the concert was on.

Q. Do you know at what point of the concert that was?

A. It was well into the concert. I wouldn't know what point. But he basically listened to it, and—

By the way, he also had a sound level meter with him. When I say it wasn't audible, it wasn't discernible on the sound level meter. There was no change in the sound signal source.

THE COURT: Was this the residential property line?

THE WITNESS: Central Park West.

THE COURT: Central Park West.

Q. If there were a musical concert in Madison Square Garden and you had to go and measure the sound level, what would be an acceptable sound level?

A. Again, we would have to look at a land use zone for Madison Square Garden. We would normally measure at the nearest residential property line and determine if it's a (76) high density, a low density residential area.

Q. Do you know what that level would be?

A. For a high density residential area, it's specified in the Code. After 10:00 p.m., it would be—I think it's 65 DBA. After 10:00 p.m., for a high density, it would be 55 DBA. Before 10:00 p.m., it would be 65 DBA.

Q. Now you don't know whether the 75 to 78 DBA number was communicated to Mr. Tuckerman at the Rock Against Racism concert?

A. If I'm not mistaken, Lieutenant McNulty—

MR. GOMBINER: Objection.

THE COURT: Do you have any personal knowledge of what communication was given?

THE WITNESS: While I was there, these numbers, by the police officers—levels within that range were communicated to Mr. Dean Tuckerman. And I think he relayed that information to the people controlling the sound levels, the amplifiers and all that.

THE COURT: Are you speaking of a time when the ambient levels—This is later?

THE WITNESS: No, this is during the concert, itself.

THE COURT: During the concert, itself. All right.

Q. Now, would an acceptable LEQ level differ, (77) depending on the location in the park at which you were taking the measurement?

A. Well, we could measure the LEQ level half the distance within the bandstand. We could have measured it further away. But when we measure it further away, it would be difficult to obtain a concert level.

In other words, if the LEQ was, say, 65 or 66, and the ambient is 60, we would then have to calculate the concert level, what it would be. When the concert level reaches a point where it's ten decibels or more above the ambient, we can ignore the sound level of the ambient completely in our calculations. It doesn't contribute anything to the sound level.

So this is one of the reasons why we stay away from an area that's quite a bit distance from the sound source in order to measure the sound source right then and there without having the ambient contribute to the level of that sound source.

Q. So then, would an acceptable LEQ number vary, depending upon the ambient level?

A. If the ambience, say was 75 decibels, and the concert level was 75 decibels, the total sound level in the area would be 78 decibels. With that type of ambient, 75-decibel ambient, no one would enjoy it. It would be pretty noisy, and the concert levels would have to go to 85 or 90 (78) at that point before you would really hear it.

Q. Well, now, if you were trying to determine what would be an acceptable LEQ level for a particular event—

A. We would have to, number one, look at the ambient; number two, look at the land use zone in the area; look for any noise sensitive facilities in the area, like a hospital or a school; how large is the area, the open area; what are the activities that area is designed for.

It would really be difficult to specify a level for a concert within a small portion of a park. It would be a difficult thing to do without taking anything else into account.

We can specify the levels at a residential property line or at a hospital property line. That could be done.

Within a park area, a lot of judgment has to come into this.

MR. VIGNOLA: I have no further questions, your Honor.

THE COURT: All right. Mr. Schulman, I think your testimony is concluded. Thank you very much.

(Witness excused)

• • •

Joint Exhibit 1 Submitted in Evidence on March 24, 1987

Appendix to the United States Court of Appeals for the Second Circuit:
Order Appealed from and Decision of Haight, J., entered May 2, 1986

REPRODUCED, *SUPRA*, ON PP. JA 78—JA 83

Joint Exhibit 1 Submitted in Evidence on March 24, 1987

Appendix to the United States Court of Appeals for the Second Circuit:
Notice of Appeal

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ROCK AGAINST RACISM,

Plaintiff,

-against-

NOTICE OF APPEAL

85 Civ. 3000 (CSH)

HON. BENJAMIN R. WARD, in his official capacity as Police Commissioner for the City of New York, et al.

Defendants.

NOTICE IS HEREBY GIVEN that the defendants appeal to the United States Court for the Second Circuit from the Order of United States District Judge Charles S. Haight, entered May 2, 1986, which on first amendment grounds preliminarily enjoined the City of New York Department of Parks and Recreation from enforcing regulations governing use of a Bandshell facility in Central Park.

Dated: New York, New York
May 16, 1986

United States Court of Appeals for the Second Circuit:
Notice of Appeal

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By: s/ Chad A. Vignola
CHAD A. VIGNOLA
Assistant Corporation
Counsel

TO: CLERK OF THE COURT
United States District Court
Southern District of New York

PETER AVENIA
Goembiner & Avenia
Attorney for Plaintiff
177 Prince Street
New York, N.Y. 10012

Notice of Motion to Alter or Amend Judgment, entered April 23, 1987

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ROCK AGAINST RACISM,

Plaintiff,

-against-

BENJAMIN R. WARD, in his official capacity as Police Commissioner of New York, *et al.*

Defendants.

NOTICE OF MOTION TO ALTER OR AMEND JUDGMENT

85 Civ. 3000 (CSH)

PLEASE TAKE NOTICE that, upon the declaration of Jonathan Pines and accompanying memorandum of law, both dated April 20, 1987, and upon all prior pleadings and proceedings had herein, the undersigned will move this Court, before the Honorable Charles S. Haight, United States District Judge for the Southern District of New York, at the United States Courthouse, Foley Square, New York, New York, on April 29, 1987, on submission, for an order, pursuant to Rule 59(e) of the Federal Rules of Civil Procedure, altering or amending the order and judgment of this Court entered April 16, 1987 in the above-captioned action, insofar as such order would permanently enjoin defendants from enforcing a provision in the Use Guidelines for the Naumburg Bandshell that prohibited solicitation for funds in Central Park, and granting such other and further relief as the Court deems just and proper.

Notice of Motion to Alter or Amend Judgment, Entered April 23, 1987

Dated: New York, New York
April 20, 1987

Respectfully submitted,

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By: s/Jonathan Pines
JONATHAN PINES

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Declaration of Jonathan Pines Read in Support of the Motion to Alter or Amend Judgment, Entered April 23, 1987

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ROCK AGAINST RACISM,

Plaintiff,

-against-

BENJAMIN R. WARD, in his official capacity as Police Commissioner of New York, *et al.*,

Defendants.

DECLARATION OF JONATHAN PINES IN SUPPORT OF MOTION TO ALTER OR AMEND JUDGMENT

85 Civ. 3000 (CSH)

JONATHAN PINES declares, under penalty of perjury, that the following is true and correct:

1. I am an Assistant Corporation Counsel in the office of Peter L. Zimroth, Corporation Counsel of the City of New York, counsel for defendants in this action. I am fully familiar with the facts and circumstances of this action, and submit this declaration in support of defendants' motion, pursuant to Rule 59(e) of the Federal Rules of Civil Procedure, to alter or amend the Court's order in this action, entered April 16, 1987.

2. Specifically, defendants seek an order altering or amending so much of the Court's April 16th order as enjoins the New York City Department of Parks and Recreation ("Parks Department") from enforcing a prohibition against solicitation for funds and revenue in Central Park. Defendants seek this relief on the ground that a challenge to the anti-solicitation provision was neither set forth in the pleadings, nor clearly identified in plaintiff's pretrial submissions, nor included among the claims specifically designated by the Court as those which it would adjudicate.

3. In this action, the plaintiff organization, Rock Against Racism ("RAR"), challenged specific provisions of a set of regu-

lations, entitled the "Use Guidelines for the Naumburg Bandshell," promulgated by the Parks Department to govern the use of the Naumburg Bandshell ("the Bandshell") in Central Park. Plaintiff claimed that the challenged provisions violated rights secured to it by the First Amendment.

4. RAR filed an Amended Complaint on November 5, 1986, which superseded a prior complaint filed on April 18, 1985. In the Amended Complaint, RAR challenged the following provisions of the Use Guidelines:

> (a) the regulation governing the permissible duration of performances at the Bandshell (Amended Complaint, ¶ 25 (a));
>
> (b) the regulation requiring use of the Parks Department's sound system provider (*id.*, ¶ 25 (b));
>
> (c) the regulation requiring payment of an application fee and a user's fee for the Parks Department's sound system (*id.*, ¶ 25 (c));
>
> (d) the regulation limiting the number of attendees at Bandshell events (*id.*,¶ 25 (d);
>
> (e) the regulation prohibiting the distribution of designated printed materials [rescinded] (*id.*,¶ 25 (e));
>
> (f) the standards by which the Parks Department measured compliance with the Use Guidelines' provisions (*id.*,¶ 25 (f)); and
>
> (g) the regulations requiring "insurance bonds, and other bonds" (*id.*,¶ 25 (g)).

A copy of the Amended Complaint is annexed as Exhibit "A."

5. The parties submitted pretrial papers, including proposed findings of fact and conclusions of law. While plaintiff's proposed findings of fact referred to a prohibition against solicitation of funds in the Use Guidelines (Plaintiff's Proposed Findings of Fact at ¶ 17(i), p. 5), and to the Department's designation of rain dates (neither of which was included in the Amended Complaint), plaintiff's conclusions of law were entirely silent as to the anti-solicitation provision. Plaintiff's Proposed Findings of Fact and Conclusions of Law are annexed cumulatively as Exhibit "B."

6. The Court heard testimony over a period of seven days, from March 23 through April 1, 1987. At the conclusion of the second day trial, the Court, noting the latitude it had given plaintiff's counsel's inquiry to that point, held that the "boundaries of this proceeding" would be determined by the conclusions of law and the pleadings previously submitted. Specifically, the Court indicated the following:

> [T]he purpose of the conclusions of law is to identify in advance particularly what regulations the plaintiffs complain of and why they complain of them, and according to the conclusions of law, which together with the pleadings I am going to take as framing the boundaries of these proceedings, the particular regulations that are complained of are these:
>
> (a) Regulations which bar the distribution, portraying, displaying, et cetera, of handbills and fliers.
>
> (b) The special events permit fee is challenged.
>
> (c) The regulations requiring the Department of Parks to provide its own sound system is challenged.
>
> (d) The regulation listing the hours of performance from two hours to six hours is challenged.
>
> And lastly, in paragraph 6 of the proposed conclusions of law it says, "Charging organizers of political events a fee, whether a direct entrance fee or an indirect insurance requirement for assembly" is challenged.

> I don't know if plaintiffs are attacking in different words the insurance fee or are also attacking the clean[-up] bond, as to which I have heard a considerable amount of testimony but does not appear to be specifically attacked in the conclusions of the law. But I am going to hold plaintiffs in their examination and cross-examination to the particular challenges made to these regulations which are set forth in the conclusions of law. That is the purpose of these pretrial papers, and I am going to enforce them.

Trial transcript at 271-273. A copy of these pages of the trial transcript are annexed as Exhibit "C."

7. Thus, the Court, in "framing the boundaries of these proceedings," did not include any challenge to the anti-solicitation provision contained in the Use Guidelines. Significantly, plaintiff's counsel did not protest in any manner the Court's determination of the scope of trial. In the circumstances, plaintiff's acquiescence should reasonably be deemed to manifest assent.

8. There was some limited testimony regarding one isolated incident involving a vendor of food during the 1986 RAR event at the Bandshell. However, in response to the Court's question regarding the relevance of the testimony, I expressly indicated that the testimony was relevant for the limited purposes of evidencing defendants' state of mind and of showing defendants' good faith in dealing with participants at last year's event. The testimony was elicited to show that, while Department officials could have confiscated the vendor's goods and issued a summons for a Health Code (not a Use Guidelines) violation, they permitted the vendor to continue to distribute goods so long as no money changed hands (Tr. 323). A copy of this portion of the trial transcript is annexed as Exhibit "D."

9. This Court, in striking down the anti-solicitation provision in the Use Guidelines, held that "[t]he City failed to identify any legitimate interest underlying this prohibition on solicitation"

(Mem. op. at 28). However, defendants lacked notice that they were obliged to present evidence in defense of this provision. Indeed, defendants had ample notice to the contrary, in the pleadings, the pretrial papers, and the Court's specific instruction. A copy of the Court's Memorandum Opinion and Order is annexed as Exhibit "E."

10. Given that the burden of notice pleading is appropriately placed on the plaintiff, it is only fair that plaintiff, and not defendants, bear the consequences of its failure to provide adequate notice of the issues to be tried.

11. As a consequence, defendants respectfully request that the Court withdraw in its entirety section "G" of the memorandum decision of April 16, 1987, entitled "Revenue" and addressed to the anti-solicitation provision, and similarly alter and amend its order of that date to delete sub-paragraph 2(e) from the permanent injunction which would restrain defendants and their agents, employees, etc., from enforcing the solicitation prohibition contained in the Use Guidelines.

WHEREFORE, defendants respectfully request that this Court grant their motion to alter or amend the judgment in this action, together with such other relief as the Court deems appropriate.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 20, 1987.

s/ Jonathan Pines
JONATHAN PINES

Exhibit A Annexed to the Declaration of Jonathan Pines
Amended Complaint

REPRODUCED *SUPRA*, ON PP. JA 84—JA 90

Exhibit B Annexed to the Declaration of Jonathan Pines
Proposed Findings of Fact and Conclusions of Law

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ROCK AGAINST RACISM,

Plaintiff,

–against–

HON. BENJAMIN R. WARD, *et al.*,

PROPOSED FINDINGS OF FACT

1. Rock Against Racism is an unincorporated organization which produced a yearly musical/political event in Central Park every year since 1979 on the first weekend in May. Central Park is and has been for many years a forum for First Amendment protected activities.

2. Rock Against Racism is dedicated to providing the highest quality sound at the lowest possible cost for political organizations of similar ideology. Rock Against Racism (Hereafter RAR) is an organization which is dedicated to the espousal and promotion of anti-racist views.

3. RAR has provided sound for hundreds of events nationwide.

4. The RAR May Concert, generally held on the first weekend in May, has been attended by approximately 2,000-4,000 people from 1979 to 1986.

5. In 1981, the RAR permit application was arbitrarily denied

and after a lawsuit was brought, in Federal Court, the event was held in Central Park.

6. In 1984 RAR was unable to secure legal representation and was forced to "agree" to an arbitrary decibel limit in order to gain access to Central Park. Said decibel limit was far too low to allow good quality sound.

7. In 1985 the RAR permit application was denied.

8. The Park Department told applicants, including RAR, in 1985 and 1986, that the Great Lawn and Sheep Meadow were absolutely unavailable for political events. No valid law or order exists to justify this policy.

9. In 1985 Rock Against Racism put in a special event application for the Naumberg Bandshell in Central Park.

10. The City of New York, through the Parks Department turned down RAR's application for their event in Central Park, and offered substitute sites.

11. These substitute sites were not in Manhattan and in no way were equivalent to any site in Central PArk.

12. Because of the City's refusal to grant access to Central Park in 1985, RAR was required to go to the United States District Court for the Southern District of New York, and move that the court grant an injunction to prevent the City

12. (cont.) from interfering in the production and requiring the City to grant the Special events for the annual May event.

13. On May 2, 1985 a stipulation of partial settlement was entered

into by the parties to the litigation which granted RAR the right to produce their annual event in Central Park with specific conditions. As a further result of the partial settlement, the City agreed to review its permit process and agreed to establish new guidelines and regulations concerning the Naumberg Bandshell.

14. On March 21, 1986 the new guidelines for the Bandshell were promulgated by the Commissioner of the Department of Parks, Henry J. Stern, and his associates.

15. In 1986, the permit application was effectively denied by these new "regulations."

16. These guidelines were created by Stern and Killian, the new Program Director for the Naumberg Bandshell, on January 26, 1986.

17. These regulations impermissibly regulate the following:

a. *Permit fees.* The regulations create a vague and unclear sliding scale between $50.00 and $100.00 for special events permits, which bears no relation to the cost of actually processing the fee.

b. *Sound amplification.* The regualtions require the Depart-

b. (cont.) ment of Parks to be the sole and only provider of sound amplification of events. The regulations also give sole discretion to the City's sound amplification system to determine the volume and quality of sound amplification.

c. *User fees.* The regulations require a "user fee" of $100.00 per performance hour with a chargeable one hour sound check.

d. *Hours of events.* The regulation are completely vague and arbitrary as to how and why the hours of use vary form one event to another, with a maximum time of six hours provided for any event. The regulations require all performances to take place between 12:00 p.m. and 6 P.M. The regulations in an arbitrary and vague manner regulate the performance of evening events.

e. *Rain Dates.* The regulations leave total discretion for rain dates in the hands of the Department of Parks.

f. *Number of participants.* The regulations limit the maximum numbers of people for each event to 3,000. The regulations give unlimited discretion to the Bandshell Program Director to choose an alternate site if he/she anticipates more than 3,000 people at an event. The number 3,000 is an arbitrary number and is not reasonably related to time, place or manner restrictions.

g. *Insurance.* The regulations give complete discretion to the Department of Parks to determine the necessity of liability insurance and the amount of liability insurance. The regulations apply only to groupsexercising First amendment assembly rights, and not to individuals who exercise their First amendment rights.

h. *Literature.* The regulations ban the distribution, display or affixing of handbills, flyers, posters, flags or banners.

i. *Solicitation.* The regulations ban the solicitation of funds.

j. The regulations regulate the use of vehicles in that vehicles are allowed only one hour to unload or pack up. This regulation infringes on RAR's ability to adequately set up or break down equipment.

17. These regulations were promulgated in order to give the City wide latitude in censoring First Amendment activity.

18. The Parks department has not consistently enforced the insurance requirement in a consistent manner.

19. In 1986 the RAR permit application was denied under these new"regulations" because of the prhibition on using any sound organization other than one selected by the City for events in Central Park.

20. On February 26, 1986, Christy Robb of RAR was contacted

by Joseph Killian and informed that he was the new program director of the Naumberg Bandshell, and that he had written the new regulations.

21. On April 1, 1986, Christy Robb for the first time received a copy of the new regulations.

22. In April 1986, RAR brought a motion for a temporary restraining order that the new regulation not be enforced because they impermissibly infringed on First Amendment protected activity.

23. On April 26, 1986, a hearing was held in front of the Hon. Charles S. Haight of the Southern District of New York, on the issue of whther a preliminary injunction would be issued.

24. During the hearing on April 26, 1986, testimony was taken from Robert Russo, Assistant Parks Commissioner for City wide Services, City of New York, and Milton Schulman,a physicist for the Department of Environmental Protection, City of New York.

25. Robert Russo testified that:

a. Noise regulations apply to all events in Central Park.

b. Each event is evaluated separately based upon its size, or the music or the expected conflicts with other areas or events in the park.

c. The RAR concert of 1985 was unique in that the Department of Parks measured the level of the noise with the sound meters.

d. No people complained of excessive noise at the 1985 RAR concert.

e. The reason that RAR was refused the Naunberg bandshell was in Mr. Russo's words, because it was a dishonorable organization in that they paid the clean-up bond with dollar

bills, and have played too loudly and engaged in slam dancing in prior years.

26. At the April 1986 hearing, Milton Schulman stated that sound testing at the 1985 RAR concert was not conducted within the Rules and Regulations of the New York City sound ordinance.

27. In both 1985, and 1986, the plaintiffs were forced to spend much of their time in the weeks prior to the May event preparing for litigation. This time would otherwise have been spent promoting the event. Because plaintiffs financial resources are limited, they were unable to compensate for these lost hours, and therefore far fewer people were made aware of the event, and fewer attended.

28. Because of the procedural roadblocks the City and its employees placed in the way of plaintiff's access to Central park, and the uncertainty as to whether a permit would be granted, the plaintiff's members have suffered much frustration, stress, and emotional trauma.

Dated: New York, New York
March 20, 1987

s/ Noah Kinigstein

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NITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ROCK AGAINST RACISM,
Plaintiff

–against–

BENJAMIN R. WARD, *et al.*,
Defendants.

85 Civ. 3000 (CSH)

PLAINTIFF'S CONCLUSIONS OF LAW

1. RAR has standing to bring this suit for declaratory judgment challenging the Naumberg Bandshell regulations. *Brockett* v. *Spokane Arcades Inc.* 472 US , 86 L Ed 2d 394, 105 S Ct. 2794 (1985); *Broadwick* v. *Oklahoma* 413 US 601, 37 L Ed 2d 830, 93 S Ct. 2908 (1973); *Grayned* v. *City of Rockford*, 408 US 104 33 L Ed 2d 222, 92 S Ct. 2294 (1972); *Bigelow* v. *Virginia* 421 US 809, 44 L Ed 2d 600, 95 S Ct. 2222 (1975).

2 & 3 Central Park is a quintissential public forum for the exercise of First Amendment rights. *Hague* v. *CIO*, 307 US 496, 83 L Ed 1423. 59 S Ct 954 (1939); *PerryEducational Association* v. *Perry Local Educational Association*, 460 US 37, 74 L Ed 2d 794 S Ct (1983), McGreary v. Stone 575 F Supp. 1112 (S.D.N.Y. 1983). The Bandshell regulations are unconstitutional because they are not contentneutral, do not serve an important governmental interest and are not narrowly drawn. *Perry*, supra, *Regan* v. *Time*, 486 US 641, 82 L Ed 2d 487, 104 S Ct 3262 (1984), *U.S.* v. *Grace*, *461* US 171

75 L Ed 2nd 736, 103 S Ct 1702 (1983), *U.S.* v. *O'Brian*, 391 U.S. 367, 20 L Ed 2nd 672, 88 S Ct 1673 (1968).

4. These regulations established a prior restraint on the right of free speech and are unconstitutional as written because

they do not have narrow, objective and definite standards to guide the licensing authority. *Shuttles worth* v. *Birmingham*, 394 US 147 22 L Ed 2nd 162, 89 S CT 935 (1969), *Saia* v. *NY* 334 US 558, 92 L Ed 1574, 68 S. CT 1148 (1948), *Heffron* v. *International Society for Krishna Consiousness, Inc*, 452 US 640, 69 L Ed 2nd, 298, 101 S CT (1981), *Hague, supra.*

5. The individual regulations violate the First amendment in the following manner.

a. Regulations which absolutely bar the distribution, protraying, displaying, the affixing, of handbills, flyers, posters, flags or banners are pre se unconstitutional. *Lovell* v. *Griffin*, 303 US 444, 82 L ed 949, 58 S Ct 666 (1937) Hague, supra, *Schneider* v. *Irvington*, 308 US 147, 84 L Ed 155, 60 S ct 146 (1939), *US* v. *Grace*, 461 US 171 75 LEd 2nd 736, 103 S CT 1702 (1983), *Members of City Council the City of Los Angelos* v. *Taxpayers for Vincent*, 466 US 789, 80 LEd 2nd 772 (1984),

b) the special events permit fee is void for overbreath because

1. It has a arbitrary discretionary scale with no standards. *Shuttles worth*, supra, *Saia*, supra, *Krishna Society*, supra, *Hague*, supra,

2. It deprives indigents persons, unable to pay the filing fee, the equal protection quaranteed by the Fourteenth Amendment. *Bullock* v. *Carter* 405 US 134, 31 L Ed 2nd 92; 92 S CT 849 (1972). *Lubin* v. *Panish*, 415 US 709 39 L ED 702, 94 S CT 1315 (1974), *Lindsey* v. *Normet*, 405 US 56, 31 L ED en 2d 36 , 92 S CT 862 (1972), *Boddie* v. *Connecticut* 401 US 371, 28 L ED 2d 113, 91 S Ct 780 (1971).

c)1. Since music and sound are forms of expression protected by the first amendment RAR should not be denied use of its own sound system. The regulation requiring the Department of Parks to provide it's own sound system is void for overbreadth. This effectively denies RAR control of the music sound, volume, quality and dynamics. *Saia*, supra, *Consolidated Edison Co of NY* v.

Public Service Commission of NY 447 US 530, 65 L ed 319, 100 S Ct (1980) *Cinevision Corp* v. *City of Burbank* 745 F 2d 560 (9th Cir 1984) cert. denied 85 L Ed 2d 480, 105 S Ct 2115.

c) 2) Said regulation is a proscribed limitation on free speech. *Fernandes* v. *Limmer*, 663 F. 2d 619 (8th Cir 1981) reh denied, 669 F.2d 729 cert. den. 458 US 1124.

3) Even if this regulation was held not to deny RAR is constitutional right to its own sound system this regulation would be valid for overbreath for its requiring a "users fee" and hourly chargeable fee. *Murdock* v. *Pennsylvania*, 319 US 105, 87 L ED 1293 S Ct (1942), *Hull* v. *Petrillo*, 439 F 2d 1184 (2nd cir 1971), *Eastern Conn. Citizens Action Group* v. *Powers*, 732 F 2d 1050 (2nd cir 1983).

1) The regulation limiting the hours of performance from two hours to six hours is invalid because it leaves to the Department of Parks, with no standards, the discretion to set the time limits, and arbitrarily limits the total hours. *Saia, supra, Shuttleworth, supra, Reeves* v. *McConn*, 631 F 2d 337 (5th Cir 1980).

2) The regulation requiring all performance to take place between noon and six p.m. is void for overbreath. *Acorn* v. *City of Frontenal* 714 F 2d 813 (8th Cir 1983), *Beckerman* v. *City of Tupelo, Mississippi* 664 F 2d 502 (5th Cir 1981).

3) The banning of all evening programs except when the Department of Parks permits otherwise is an invalid time, place and manner regulation. *Shuttles worth, supra, US* v. *Abney*, 534 F 2d 984 (D.C. Cir 1974), *People* v. *Dominck*, 326 NYS 2nd 466 (1971).

e) The regulations impermissibly regulate the total maximum number of people and give the Program Director the discretion to ban the event if he/she feels the crowd will exceed 3,000. *A Quaker Action Group* v. *Morton*, 516 F 2d 717 (D.C. Cir 1975), *Hefron*, Supra.

f) The Department of Parks has total control to set the amount, if any, of liability insurance, this is an impermissible dis-

cretion and void for for overbreath., *Shuttles worth*, supra, *Saia*, supra, *Heffrom*, supra, *Hague*, supra,

Collin v. *Smith*, 447 F. Supp 676, aff'd 578 F 2d 1197, cert denied 439 US 916, 58 L ED 2d 264, 99 S Ct 291 (1978), *Eastern Conn.* supra.

6. Charging organizers of political events a fee (whether a direct "entrance fee" or an indirect "insurance requirement") for "assembly" (within the meaning of the First amendment) when no fee is required for individuals who engage in precisely the same activity discriminates against those who choose to exercise their free speech right collectively (assemble) rather than individually. *DeJonge* v. *Oregon*, (1937) 299 US 353, 81 L ed 278 57 S Ct 255.

7. Presumed damages for the violation of the plaintiff's First Amendment rights should be awarded, independent of the damages awarded to the plaintiff's in compensation for the injuries they have suffered. *Herrea* v. *Valentine*, 653 F.2d 1222 (8th Cir 1983).

8. The plaintiff's should receive compensatory damages for all time and wages lost as a result of futile efforts to secure their First Amendment rights, and for all emotional trauma that they have suffered as a result of deprivation of these rights by the defendant. *Carey* v. *Pipkus*, 435 U.S. 247 264 (1978).

9. Because the defendant municipal officers have displayed callous indifference to the rights of the plaintiff's and other citizens seeking access to Central Park, a quintessential public forum, and have intentionally denied the plaintiff's access to that forum, punitive damges should be awarded. Punitive damages are also necessary to deter these officials from displaying such callous indifference to the First Amendment rights of citizens in the future. *Haile* v. *Village of Sag Harbor*, 639 F. Supp 718 (E.D. NY 1986) *Smith* v. *Wade*, 461 U.S. 30, 103 S. Ct. 1625 7 S L.Ed. 632 (1983).

Dated: New York, New York
March 20, 1987

s/ Noah A. Kinigstein

NOAH A. KINIGSTEIN
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Exhibit C Annexed to the Declaration of Jonathan Pines
Trial Transcript Pages 271-273

Horowitz—direct

(271)* * *not possible to give to the court the Naumburg Bandshell regulations presently in force. What the present evidence consists of is use guidelines for the Naumburg Bandshell in Central Park dated March 21, 1986. If there is a subsequent written version, altered in any way, obviously that should be brought to court first thing tomorrow morning. True?

MR. PINES: Yes. Your Honor, there will be no problem. We were awaiting our case in chief to put in that exhibit and we will undertake to bring it to court. I was planning to bring it in with Joseph Killian's testimony, and unfortunately, because he is out of town, I am not sure. But I will make every effort to get to his office and obtain that, the current use guidelines. I appreciate the court's need to have those regulations.

THE COURT: I think that would be very useful. If there is any question about authenticity, then I suppose their formal receipt into evidence may have to await the testimony of a witness who can qualify them. But we will see where we go on that.

Now, as far as the scope of plaintiff's inquiry is concerned, I have given counsel some latitude, I think, but the purpose of the conclusions of law is to identify in advance particularly what regulations the plaintiffs complain of and why they complain of them, and according to (272) the conclusions of law, which together with the pleadings I am going to take as framing the boundaries of these proceedings, the particular regulations that are complained of are these:

(a) Regulations which bar the distribution, portraying, displaying, et cetera, of handbills and fliers.

(b) The special events permit fee is challenged.

Exhibit C Annexed to the Declaration of Jonathan Pines
Horowitz—direct

(c) The regulation requiring the Department of Parks to provide its own sound system is challenged.

(d) The regulation listing the hours of performance from two hours to six is challenged.

Next, the requirement in respect of liability insurance is challenged.

And lastly, in paragraph 6 of the proposed conclusions of law it says "Charging organizers of political events a fee, whether a direct entrance fee or an indirect insurance requirement for assembly, is challenged.

I don't know if plaintiffs are attacking in different words the insurance fee or are also attacking the cleaning bond, as to which I have heard a considerable amount of testimony but does not appear to be specifically attacked in the conclusions of law.

But I am going to hold plaintiffs in their examination and cross-examination to the particular challenges made to these regulations which are set forth in (273) the conclusions of law. That is the purpose of these pretrial papers and I am going to enforce them.

So with those words of caution, warning, encouragement, I will adjourn these proceedings until tomorrow morning.

MR. PINES: Your Honor, if I may be heard for one moment.

THE COURT: Yes.

MR. PINES: We have not yet resolved the matter of the commissioner's appearance. The plaintiffs had suggested that we stipulate to the commissioner's lack of personal involvement in the regulations. I am prepared to offer on the record what our position is with respect to that, and I would very earnestly hope that we can resolve that now, so that if the commissioner has to be alerted to appear, he can make the appropriate shift in his sched-

ule, his very busy time in the Parks Department, to appear here. He is certainly willing to do so, but our position is it should not be necessary.

THE COURT: Then I will ask the plaintiffs to give me an offer of proof as to what they intend or hope to elicit from Commissioner Stern. What is the answer to that?

MR. PINES: And Kate Pearson as well.

THE COURT: One at a time. Let's start off with Commissioner Stern.

Exhibit D Annexed To The Declaration of Jonathan Pines
Trial Transcript Page 323

Dalton—direct

A. Yes.

Q. Do those laws permit you to close down vendors of food in the park?

A. Yes, to confiscate and summons.

Q. Could you have in fact confiscated and issued a summons to the person who was selling the food?

THE COURT: Is this really a part of this case, Mr. Pines?

MR. PINES: Yes, your Honor, I believe that it is. To the extent that the plaintiffs have suggested that there is some animus specifically directed toward RAR, I believe it is very much probative of the lengths to which the Parks Department has in fact—

THE COURT: All right. Save the argument. Put the question.

Q. Could you in fact have issued a summons and confiscated the food?

A. Yes, we could have.

Q. But you did not?

A. We didn't, no.

Q. Do you have any opinion about RAR personally?

A. Another event.

Q. It has no special significance to you?

A. No, none at all.

Q. Are you offended by their music?

Exhibit E Annexed To The Declaration of Jonathan Pines
Memorandum Opinion and Order of Haight, J.,
entered on April 20, 1987

Reproduced in the Appendix to Petition for a Writ of Certiorari at p.23

Order of Permanent Injunction and Judgment,
Entered April 26, 1987

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ROCK AGAINST RACISM,
Plaintiff,

- against -

BENJAMIN R. WARD, in his official capacity as Police Commissioner of New York;

GEORGE SCARPELLI, in his official capacity as Chief of Operations for Department of Parks;

SHELDON HOROWITZ, in his official capacity as Special Events Director for the Department of Parks;

ROBERT RUSSO, in his official capacity as Assistant Parks Commissioner for Citywide Services, New York City Department of Parks and Recreation;

JOSEPH KILLIAN, in his official capacity as Program Director for the Mall Bandshell of the Bethesda Terrace area of Central Park in the City of New York, Department of Parks and Recreation;

MAYOR EDWARD KOCH, in his official capacity as the Mayor of the City of New York; and

THE CITY OF NEW YORK,
Defendants.

85 Civ. 3000-(CSH)

ORDER OF PERMANENT INJUNCTION AND JUDGMENT

This case having come on for trial before the Court sitting without a jury; and the Court having entered concurrently herewith its Findings of Fact and Conclusions of Law; it is hereby

ORDERED, ADJUDGED AND DECREED as follows:

1. This Court's Order dated May 1, 1986 is vacated and superseded by this Order.

2. The defendants, their officers, agents, servants, employees, and attorneys, and all those persons in active concert or participation with them who receive actual notice of this Order by personal service or otherwise, are hereby PERMANENTLY ENJOINED from enforcing against plaintiff Rock Against Racism the following provisions of those certain "Use Guidelines for the Naumberg Bandshell in Central Park" promulgated by the City of New York Parks and Recreation Department, under date of March 21, 1986:

(a) The user fee for the Bandshell sound amplification system.

(b) Those provisions of the Guidelines governing hours of use; provided, however, that defendants may enforce those provisions permitting sound amplification only after 12:00 P.M., and requiring events to be finished by 9:30 P.M.

(c) That provision limiting attendance at the Bandshell and its adjacent concert ground to a maximum of 3,000 people at any event.

(d) That provision calling for the furnishing of insurance.

(e) That provision prohibiting the solicitation for funds and revenue.

3. Except as specifically provided in the foregoing paragraph of this Order, plaintiff's motion for a permanent injunction and complaint for declaratory judgment are denied.

4. Plaintiff's claims for compensatory and punitive damages are denied.

The foregoing constitutes the final Order and Judgment of this Court.

Date: New York, New York
April 16, 1987

s/ Charles S. Haight, Jr.
Charles S. Haight, Jr.
U.S.D.J.

Affirmation of Noah A Kinigstein Read in Opposition to Defendants' Motion to Alter or Amend Judgment, Entered April 29, 1987

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ROCK AGAINST RACISM,

Plaintiff,

- against -

BENJAMIN R. WARD, in his official capacity as Police Commissioner of New York, *et. al.*

Defendants.

AFFIRMATION IN OPPOSITION TO DEFENDANTS' MOTION TO ALTER OR AMEND JUDGMENT.

85 Civ. 3000 (CSH)

I, NOAH A. KINIGSTEIN, being an attorney duly licensed to practice law in the State of New York and in the United States District Court for the Southern District of New York affirm the following under penalties of perjury:

1. I am the attorney for the above named plaintiff and as such I am fully familiar with the facts and circumstances of this case.

2. I am submitting this affirmation in opposition to the defendants' motion to alter or amend the judgment rendered by this Court on April 16, 1987.

3. The defendants' have moved this Court to alter or amend its judgment as to its finding that the solicitation regulation of the Naumberg Bandshell regulations is facially unconstitutional under the First Amendment. The defendants base their motion on the fact that they did not have notice of plaintiff's challenge to said statute and therefore were put at an unfair disadvantage.

4. Upon information and belief, although the issue of the unconstitutionality of the solicitation statute was not directly

raised in plaintiff's amended complaint, nevertheless there is language in the complaint which challenges the constitutionality of all the Naumberg Bandshell regulations (see Defendants Exhibit A, paragraph 28).

5. In addition, plaintiff did raise the issue of the constitutionality of the solicitation statute in its pre-trial Findings of Fact (See Defendant's Exhibit B, paragraph 17 (i)).

6. It is plaintiff's position that defendants were on adequate notice that all of the regulations were being challenged. In addition, Alan Thompson testified that the plaintiff needed to solicite for funds in order to defray the costs of the concert, and that there ability to put on the annual concert was, to a great extent, dependent upon the ability to solicite at the concert.

7. Upon information and belief, the issue of the constitutionality of the solicitation regulation was made part and parcel of the trial proceedings. There was extensive testimony and cross-examination on the issue of solicitation.

8. Upon information and belief, this Court has the power and the authority to construe the pleadings to do substantial justice. Upon information and belief, substantial justice in this case includes the Court's analysis and determination of the solicitation statute as part of the Court's decision.

WHEREFORE, Plaintiff respectfully requests that defendant's motion to amend or alter the judgment be denied.

Dated New York, New York
April 28, 1987

s/ Noah A. Kinigstein
NOAH A. KINIGSTEIN

Notice of Cross-Motion to Alter or Amend Judgment, Entered April 29, 1987

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ROCK AGAINST RACISM,

Plaintiff,

- against -

BENJAMIN R. WARD, in his official capacity as Police Commissioner of New York, *et. al.*

Defendant.

NOTICE OF CROSS-MOTION TO ALTER OR AMEND JUDGMENT.

85 Civ. 3000 (CSH)

PLEASE TAKE NOTICE, that upon the affirmation of NOAH A. KINIGSTEIN, ESQ., dated April 27, 1987, and upon all prior pleadings and proceedings had herein, the undersigned will cross-move this Court, before the Honorable Charles S. Haight, United States District Judge for the Southern District of New York at the United States Courthouse, Foley Square, New York, New York, on April 19, 1987, on submission for an order pursuant to Rule 59(e) of the Federal Rules of Civil Procedure, altering, amending or clarifying the order and judgment of this Court entered April 16, 1987, in the above captioned action, insofar as such order is unclear as between the Memorandum Opinion and Order and the Order of Permanent Injunction and Judgment as to whether the Plaintiff Rock Against Racism is allowed to actually control the mixing board and sound system which is to be provided by the Defendants' leased sound system, New York Sound, and granting such other and further relief as the Court deems just and proper.

Dated: New York, New York
April 27, 1987

Respectfully Submitted,

s/ Noah A. Kinigstein

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TO: PETER L. ZIMROTH
Corporation Counsel
of the City of New York
Attorney for the Defendants
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New York, NY 10007
By: Jonathon Pines Esq.

Affirmation of Noah A Kinigstein Read in Support of the Cross-Motion to Alter or Amend Judgment, Entered April 29, 1987

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ROCK AGAINST RACISM,

Plaintiff,

AFFIRMATION

- against -

BENJAMIN R. WARD, in his official capacity as Police Commissioner of New York, *et. al.*

85 Civ. 3000 (CSH)

Defendants.

I, NOAH A. KINIGSTEIN, being an attorney duly licensed to practise law in the State of New York and in the United States District Court for the Southern District of New York affirms the following under penalties of perjury:

1) I am the attorney for the plaintiff in the above captioned case and as such I am fully familiar with the facts and circumstances of this action.

2) I am submitting this affirmation in support of plaintiff's cross-motion pursuant to Rule 59(e) of the Federal Rules of Civil Procedure to alter, amend or clarify the Court's Order in this action entered on April 16, 1987.

3) Specifically, plaintiff has brought on this cross-motion to alter, amend or clarify the Court's Order for two reasons:

a) It appears that there is an inconsistency between the Court's Memorandum Opinion and Order (See Exhibit A) and the Court's Order of Permanent Injunction (See Exhibit B), both dated April 16, 1987, as to whether the plaintiff has the right to control the sound system "mix" at their annual concert, now scheduled for may 3, 1987 at the Naumburg Bandshell, Central Park;

b) It has become clear in the past several days, in preparation for the May 3, 1987 concert that the defendants have interpreted the Order of Permanent Injunction and Judgment to allow the City's leased sound system to control the mixing board at the may 3, 1987 concert.

4) On April 24, 1987, I spoke with Jim Fossbinder, co-counsel in this case, who informed me that in meetings between the plaintiff and the defendants, in preparation for the May 3, 1987 concert, the defendants interpreted the Court's Order as to deny plaintiff the right to control the mix at the concert.

5) I immediately called Jonathan Pines, the defendants' attorney and asked for clarification of the City's position. I was informed by Mr. Pines that it was the defendants' position that RAR would not be allowed to actually manipulate the sound system mixing board, that is that RAR's sound technician would not be allowed to physically set the sound mix. I was further informed that the New York Sound system would be used. I was finally informed that an RAR representative would be allowed to stand by the mixing board and give verbal instructions to the New York Sound technician.

6. I informed Mr. Pines that my reading of the Court's Order was contrary to his and requested the plaintiff be allowed to control the sound board. I was informed that that would not be possible. I then informed Mr. Pines that plaintiff's would have to bring on a motion to clarify the decision as to this important matter. Mr. Pines agreed to this expedited cross-motion because of the time constraints of the RAR concert being scheduled for May 3, 1987.

7. Upon information and belief, one of the key issues that was raised during the course of the trial was the issue of the control of the sound mixing board. Alan Thompson, RAR sound

technician, testified that if RAR did not control the mix of the sound, that certain bands would refuse to play at the concert. Alan Thompson also testified that he has extensive meetings and communications with all bands in order to understand the mixing requirements in order for the true expression of the bands music to be expressed. He testified that he is constantly mixing the sound and receiving instructions as to the necessary changes in the mix. In addition, the issue of who controls the mixing board was central to the defendants' case in that defendants went to great lengths to show that the City's leased sound company had an excellent compliment of sound equipment to take care of the needs of bands performing at the RAR event.

8) The Court in its Memorandum Opinion and Order of April 16, 1987 spoke directly to the central issue when it held:

> "... I accept that RAR has a First Amendment right to the use of a sound amplification system capable of producing the quality of sound it desires, and the level of sound necessary to reach throughout the audience area. I do not detect a First Amendment right to own the sound amplification system used. The City's implementation of the Bandshell guidelines provides for a sound amplification system capable of meeting RAR's technical needs and leaves control of the sound "mix" in the hands of RAR. Nothing further is required by the First Amendment...." (See page 13-14 of Exhibit A).

9) It is plaintiff's understanding of this section of the Memorandum Opinion and Order that to leave control of the sound mix in the hands of RAR means that RAR has the right under the First Amendment to manipulate the dials and levers of the sound board to create the necessary mix for the individual bands.

10) Upon information and belief, if the New York Sound technician is permitted to "mix" the sound several scheduled bands will not perform. In addition, and upon information and

belief, the sound mixed by the New York Sound technician and the RAR technician will not be the same. It is further alleged upon information and belief that RAR is in much better position to mix the music in the only manner that will be consistent with the true expression of the band's protected speech.

WHEREFORE, plaintiff respectfully requests that this Court grant its motion to alter, amend or clarify the judgment in this action and with such other relief as the Court deems appropriate.

Dated: New York, New York
April 27, 1987

s/ Noah A. Kinigstein
NOAH A. KINIGSTEIN

Exhibit A Annexed To The Affirmation Of Noah A. Kinigstein

Memorandum Opinion and Order of Haight, J.,
Entered on April 20, 1987

Reproduced in the Appendix to Petition for a Writ of Certiorari at p. 23

Exhibit B Annexed To The Affirmation Of Noah A. Kinigstein

Order of Permanent Injunction and Judgment,
Entered April 26, 1987

REPRODUCED, *SUPRA*, ON PP. JA491—JA493

Notice Of Appeal To The United States Court Of Appeals For The Second Circuit, Entered May 14, 1987

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ROCK AGAINST RACISM,

Plaintiff,

- against -

85 Civ. 3000 (CSH)

BENJAMIN R. WARD, in his official capacity as Police Commissioner of New York;

GEORGE SCARPELLI, in his official capacity as Chief of Operations for Department of Parks;

SHELDON HOROWITZ, in his official capacity as Special Events Director for the Department of Parks;

ROBERT RUSSO, in his official capacity as Assistant Parks Commissioner for Citywide Services, New York City Department of Parks and Recreation;

JOSEPH KILLIAN, in his official capacity as Program Director for the Mall Bandshell of the Bethesda Terrace area of Central Park in the City of New York, Department of Parks and Recreation;

MAYOR EDWARD KOCH, in his official capacity as the Mayor of the City of New York; and

THE CITY OF NEW YORK,

Defendants.

NOTICE OF APPEAL TO UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Notice is hereby given that Rock Against Racism above named, hereby appeals to the United States Court of Appeals for the Second Circuit from the part of the final order of permanent injunction and judgment which is concerned with the user fee for the Naumburg Bandshell amplification system and the right of Rock Against Racism to use and control their own amplification system at their yearly event at Central Park, New York, and the Court's order to withdraw its decision the constitutionality of the solicitation regulation of the New York City Department of Parks Naumburg Regulations.

May 6, 1987

s/ Noah A. Kinigstein

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Supreme Court, U.S.
FILED
NOV 29 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-226

IN THE

Supreme Court of the United States

October Term, 1988

BENJAMIN R. WARD, *et al.*,

Petitioners,

-against-

ROCK AGAINST RACISM,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONERS

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November 28, 1988

**Counsel of Record*

QUESTION PRESENTED

Did the Second Circuit apply the proper constitutional standard of review as articulated in prior holdings of this Court in *Clark* v. *Community for Creative Non-Violence*, 468 U.S. 288 (1984) and *United States* v. *Albertini*, 472 U.S. 675 (1984), in concluding that the municipal agency's content-neutral regulations reducing offensive noise of performances in an urban park, promulgated after a lengthy and thorough investigation, which in part required that an approved private sound engineer would control the sound board thereby limiting the loudness but providing the sound mix the performers desired, was unconstitutional as an improper infringement of artistic expression under the First Amendment based on its finding that the municipality failed to prove its regulations were the "least intrusive" and that the municipality, barring any other realistic technological alternative, could always "pull the plug" although the Court never commented on any possible threat to public safety and park property such conduct may create?

PARTIES

The parties in this case are as follows:

1. Rock Against Racism, respondent.

2. Benjamin R. Ward, in his official capacity as Police Commissioner of the City of New York, petitioner.

3. George Scarpelli, in his official capacity as Chief of Operations for the Department of Parks, petitioner.

4. Sheldon Horowitz, in his official capacity as Special Events Director for the Department of Parks, petitioner.

5. Robert Russo, in his official capacity as Assistant Commissioner for City-Wide Services for the Department of Parks, petitioner.

6. Joseph Killian, in his official capacity as Program Director for the Mall Bandshell of the Bethesda Terrace area of Central Park in New York City, Department of Parks, petitioner.

7. Mayor Edward Koch, in his official capacity as Mayor of the City of New York, petitioner.

8. The City of New York, petitioner.

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THE NEW YORK CITY DEPARTMENT OF PARKS AND RECREATION'S USE GUIDELINES ARE CONSTITUTIONAL AS THEY MEET THIS COURT'S TEST OF REASONABLE TIME, PLACE AND MANNER RESTRICTIONS BY GOVERNMENT WITH ONLY INCIDENTAL IMPACT ON THE EXERCISE OF FIRST AMENDMENT RIGHTS. THE PARKS DEPARTMENT'S DETERMINATION, AS REFLECTED IN THE USE GUIDELINES, TO REQUIRE SPONSORS OF EVENTS AT NAUMBURG BANDSHELL, A PUBLIC FORUM, TO USE A CITY DESIGNATED PROFESSIONAL SOUND ENGINEER, WHO WAS REQUIRED TO PROVIDE THE AESTHETIC MIX DICTATED BY SPONSORS AND A SOUND SYSTEM TAILORED TO THE INDIVIDUAL REQUIREMENTS OF SAID SPONSORS, AFFORDED USERS OF THE BANDSHELL UNFETTERED EXPRESSION TEMPERED ONLY BY THE NECESSARY REGULATION OF LOUDNESS TO PROTECT THE RIGHTS OF OTHER USERS OF THE PARK AND NEARBY RESIDENTS.

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No. 88-226

IN THE

Supreme Court of the United States

October Term, 1988

BENJAMIN R. WARD, *et al.*,

Petitioners,

-against-

ROCK AGAINST RACISM,

Respondent.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONERS

OPINION BELOW

The opinion of the Court of Appeals for the Second Circuit, dated June 2, 1988, is reported at 848 F.2d 367 and appears in the Appendix to the Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit at page 1.

The decisions of the United States District Court for the Eastern District, dated April 6, 1987, and April 30, 1987, appear in the Appendix to the Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit at page 23 and page 85. The first decision was reported at 658 F.Supp 1346 (S.D.N.Y. 1987). The second decision was not reported officially.

JURISDICTION

The judgment of the Court of Appeals was entered on June 2, 1988. The Petition for a Writ of Certiorari was filed on or about August 3, 1988 and was granted on October 3, 1988. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

STATEMENT OF FACTS[1]

The History of the Litigation

On or about April 19, 1985, Rock Against Racism (hereafter "RAR") commenced this action seeking an order requiring issuance of a permit for RAR to use the Central Park Naumberg Bandshell for a concert/political rally on May 5, 1985 (JA14).[2] On April 25, 1985, at the suggestion of the District Court, the parties reached a settlement in which the Department of Parks and Recreation agreed to issue RAR an event permit for use of the Bandshell if RAR would agree to abide by all Parks Department Regulations (JA382-383, 387-390). After further proceedings, on July 17, 1985, the case was placed on the reserve calendar (JA7, 384-385).

On April 23, 1986, RAR filed a motion for a preliminary injunction against the City from interfering with its annual concert scheduled at the Bandshell for May 4, 1986, and challenging as unconstitutional the Use Guidelines for the Naumberg Bandshell in Central Park issued by the Parks Department on March 21, 1986 (JA21). On May 1, 1986, the District Court, on the basis of

[1] The Statement of Facts, including the summary of testimony at trial, is limited to those issues raised on this appeal.

[2] Numbers in parentheses preceded by the letters "JA" refer to the pages of the Joint Appendix. Numbers in parentheses preceded by the letter "A" refer to the pages of the Appendix of the Petition for a Writ of Certiorari.

what it later described as "a relatively sketchy record" (A37),[3] upheld the Use Guidelines' requirements for a licensing fee, clean-up bond, and liability insurance, but struck down as unconstitutional the Guidelines' requirement that the Parks Department be the sole provider of sound amplification for Bandshell events and that the hours of the RAR's concert be limited to the Guidelines' reasonable time requirements (JA78-83).[4]

On November 5, 1986, RAR filed an Amended Complaint seeking both a declaratory judgment that the Use Guidelines were unconstitutional, and compensatory and punitive damages (JA84-90).

From March 23 through April 1, 1987, the Court conducted a trial regarding RAR's claims.

The Creation of Use Guidelines for the Naumburg Bandshell in Central Park

a. Why Use Guidelines Were Formulated for the Bandshell.

The Central Park Naumburg Acoustic Bandshell (hereafter "Bandshell"), designed to amplify sound, is located at 72nd Street and Fifth Avenue in New York City; and faces west (JA24, 202). It is a hexagonal amphitheater in a semicircle with seats for people to sit and listen (JA202, 407). Seating can be provided for up to three thousand people. The Bandshell area is the most frequently

[3] In its May 1 opinion, the District Court stated that "the timing [of the motion] does not permit extended analysis or discussion" as "[n]o arrangements were made to bring the dispute before the Court before April 23" (JA79). Moreover, the District Court indicated that "[n]o evidentary record exists except the opposing affidavits" (JA79).

[4] The City appealed the preliminary injunction enjoining the enforcement of the Use Guidelines provisions regarding sound amplification and hours of an event. The Court of Appeals for the Second Circuit dismissed the appeal as moot on August 20, 1986 because RAR had conducted its concert/political rally on May 4, 1986 and therefore, "the order appealed from no longer presents a live case or controversy." The Appendix to the appeal was offered jointly by petitioners and respondent as an exhibit during the trial of the instant case and was received in evidence (JA351-456).

used park facility in New York City (JA202), with the greatest proportion of events attracting large crowds (JA24, 202). The Bandshell season begins in the spring and runs until early fall. Approximately 1,000 event permits are issued each year for Manhattan parks, with about 330 in Central Park (JA24, 202). Of the 330 permits issued for events in Central Park, approximately 160 to 175 permits involve the use of the Bandshell (JA202).

Joseph Killian assumed the position of Program Director for the Mall/Bandshell/ Bethesda Terrace of the City of New York Department of Parks and Recreation ("Program Director") on January 27, 1986 (JA188). Killian was the first Program Director for the Mall/Bandshell/Bethesda Terrace area, the position having just recently been created (JA24). At the time of his hiring, he was told by Parks officials that the new position had been created to consolidate the fragmented responsibility for the Bandshell, and in recognition of the Bandshell's unique function as the busiest New York City park facility (JA24-25, 200-201). Previously, many Bandshell applicants had complained that they faced a bureaucratic maze of several City agencies and a host of sub-unit departments and divisions with control over one aspect or another of the Bandshell's application process (JA24-25). Vehicle permits, special event permits, and sound permits each had to be procured from a different office (JA25, 201). The Parks Department's Maintenance and Operations Division, the Special Events Director, Urban Park Services, the Central Park Administrator, and the New York City Police Department all had to be contacted (JA25, 201).

An adjunct to the fragmented structure was the lack of a single source of rules governing the Bandshell's use (JA25). Without possession of any set of rules, much less one set of rules specifically applicable to the Bandshell, applicants had even greater difficulty expeditiously negotiating the bureaucratic obstacles inherent in such dispersed authority (JA25). Creation of the position of Program Director was intended to address these applicant

complaints and to maximize the public's use of the Bandshell. Groups seeking use of the Bandshell now need to only contact the Program Director's office (JA201). The previously diffuse responsibilities were consigned solely to the Program Director for coordination and implementation (JA201).

When Joseph Killian commenced employment with the City, his initial and primary responsibility was to develop a uniform set of guidelines to be applied consistently to all applicants for the Bandshell (hereafter referred to as "the Use Guidelines") (JA204-205). Importantly, the Use Guidelines were to apply to all sponsors regardless of the type of event or expression presented (JA25, 211). The guidelines were never intended to limit or restrict the type of event (JA211). The purposes of the Use Guidelines were both to inform prospective applicants of the varied potential of the Bandshell, and to specify what was expected of them as users of the Bandshell. Joseph Killian explained these purposes at the trial (JA206):

> In all honesty, we're trying to serve groups. I mean, one of the difficulties is most of the people who use the bandshell are not producers, they are independent, they are ad hoc, whatever, and they come to use the facility and they don't know about sound or they don't know that we have no bathrooms there. So what we're trying to do is service them by saying here are the kind of things you're going to need to know about, here are the things that the department requires, and you can go to this office and get it done.

A number of steps were taken in the formulation of the Use Guidelines. Since Killian had been intimately involved in theatre, dance, music concerts and special events programming and production, including the development of a similar program in Grand Rapids, Michigan, he knew what general framework would be needed (JA25-26). To develop specific guidelines appropriate for the Bandshell facility, however, it was important for Killian to

familiarize himself with the particular characteristics, requirements, strengths, and disadvantages of the Bandshell, as well as its organizational place in the Parks Department (JA25-26).

First, Killian acquainted himself with the departments having primary responsibility over the Bandshell: the Central Park Administrator, the Parks Department Manhattan Borough Commissioner, and the Office of the Commissioner. He then arranged preliminary interviews with key individuals in each of these offices (JA26, 206-209).

After these preliminary interviews, Killian reviewed the follow-up reports by the Maintenance and Operations' crew of every 1985 event at the Bandshell. This involved review of approximately 100 applications. He also examined about ten to fifteen more detailed reports on events held at the Bandshell and surrounding areas (JA26, 207).

Killian learned that Central Park receives more than 13,000,000 visitors annually (JA24). He found that recent studies reviewed by the Parks Department showed that the large majority of visitors come to Central Park to relax (JA29, 40-46, 194, 207). On the weekends, passive recreation accounted for over 80 percent of park use, with simple "relaxation" alone reaching nearly 60 percent (JA29, 40-42, 44, 194). Music accounted for 5.7 percent of weekend park use (JA41; *see*, copy of 1983 City University of New York Study of Central Park [JA39-60]).

Two or three hundred yards southwest of the Bandshell is the Central Park area known as the "Sheep Meadow" (JA29). It is a thirteen-acre plot of land set aside for passive recreation (JA29, 192). The Sheep Meadow was designated a quiet zone, along with several other areas throughout the City, by mayoral decree of Edward I. Koch on July 25, 1985 (JA29, 192-193). No organized sports are allowed in the Sheep Meadow. People sun themselves there, read books, sit down and relax (JA29). According to Robert Russo, a Deputy Commissioner of Operations, visitors in

the Sheep Meadow are affected by loud performances in the Bandshell (JA397-398).

Based on his knowledge of special events production, his observation of the specific physical capabilities of the Bandshell area of Central Park, the various descriptive reports of 1985 events and park studies, and based upon his initial discussions with various Parks Department officials, Killian wrote the first draft of the Use Guidelines (JA25-27, 206-209). This first draft was reviewed by his direct supervisor, Marie Ruby, the Assistant Administrator for Visitor Services (JA27). The finalized version of the Use Guidelines was signed by the Commissioner of Parks on March 21, 1986 (JA207, 372-379).

b. Why the City Decided to Require Use of Its Own Sound Amplification System for Events at the Bandshell.

In formulating the Use Guidelines, the decision was made to require use of the City's sound amplification system for events at the Bandshell.[5] Killian's decision was rooted in two problems his investigation had disclosed (JA30). Sound amplification at the

[5] The Use Guidelines provide as follows on sound amplification:

> **SOUND AMPLIFICATION**
>
> To provide the best sound for all events Department of Parks and Recreation has leased a sound amplification system designed for the specific demands of the Central Park Bandshell. To insure appropriate sound quality balanced with respect for nearby residential neighbors and the mayorally decreed quiet zone of Sheep Meadow, all sponsors may use only the Department of Parks and Recreation sound system. DEPARTMENT OF PARKS AND RECREATION IS TO BE THE SOLE AND ONLY PROVIDER OF SOUND AMPLIFICATION, INCLUDING THOUGH NOT LIMITED TO AMPLIFIERS, SPEAKERS, MONITORS, MICROPHONES, AND PROCESSOR.
>
> Clarity of sound results from a combination of amplification equipment and a sound technician's familiarity and proficiency with that system. Department of Parks and Recreation will employ a professional sound technician [who] will be fully versed in sound bounce patterns, daily air currents, and sound skipping within the Park. The sound technician must also consider the Bandshell's proximity to Sheep Meadow, activities at Bethesda Terrace, and the New York City Department of Environmental Protection recommendations (JA375-376).

Bandshell conflicted with the enjoyment of the park by other park users, as well as disturbed residents in nearby, park-adjacent, buildings. The Bandshell "is in the heart of the park" (JA214). It "is where the majority of the people are. They are somewhere between 56th and 72nd between Fifth Avenue and Central Park West. That's where the bulk of our users are" (JA214). Since passive recreation accounted for over 80 percent of the park's use (JA29, 194), Killian was concerned with the fact that past complaints indicated "that sound levels were continuing to bleed out beyond the concert ground area for many events" (JA213). Noise levels from users of the Bandshell had evoked complaints from both park users and nearby residents (JA212). Killian found that the complaints centered on "I am over here on the other side of the park and . . . I can't sit here, relax" (JA214). Moreover, Killian had to consider the close proximity of the Sheep Meadow, a designated "quiet zone" (JA193) because "(p)eople enjoy sunbathing and relaxing" (JA214). Thus, for Killian, noise "was a real factor" that he based much of his noise regulations around (JA217). He explained, however, that by containing the sound in the Bandshell area, neither he nor the Parks Department sought to control the content or quality of Bandshell events (JA25, 211).

The second reason Killian decided that sound amplification at the Bandshell should be provided by the Parks Department was that he learned "that groups were often unfamiliar with producing events outdoors and they would come in with inadequate equipment and both their event and also the audience that was there to see it would suffer" (JA30, 189).

> Often times groups that use outdoor—if they are not familiar with outdoor—even if they are, they will use loudness and simply a loud decibel level to make up for—they may not be able to mix the sound very well and yet they feel that they can turn it louder, and excessively loud, that that makes up for it, and they try and, in a certain sense, override the mixing (JA218).

In addition, inadequate equipment used by some groups did not provide the amplification levels required, and "crowds unhappy with the poor sound became disappointed or unruly" (JA30).

Therefore, Killian was "looking for a way that we could provide quality sound and yet sound that did not bleed over into other areas of the park . . ." (JA219). To achieve this purpose, Killian decided to hire a private sound company for all Bandshell events.

Killian had considered alternative solutions to the sound problem. He considered negotiating with each individual group and agreeing on a decibel level (JA219-220). He considered allowing the public user to bring in its own sound system while the Parks Department would provide the sound technician (JA220). Killian considered as his third option "getting an independent vendor to provide sound, someone with extensive experience in all phases of music and dance and theatre to provide sound" (JA220). The first option was rejected because it was impossible to pick out a single decibel level because it could not be enforced and differences in temperature, foliage and audience size made picking one decibel level "very, very difficult" (JA220, 285-286). Killian was advised by the City's Department of Environmental Protection that variations in actual sound impact of particular decibel levels were too great to justify selection of a single decibel level (JA31). The second option was rejected because most technicians prefer to work with their own equipment (JA220), and lack of familiarity with the equipment would interfere with their ability to do a good job. In this way, Killian concluded that his third option was the most viable (JA220).

After the decision was reached to hire a private company, Killian contacted Gary Floyd as a consultant to draw up a "menu" of basic needs the Parks Department would want from a private sound company (JA221). Killian told Floyd he "wanted somebody with outdoor experience, good quality reputation, and also a

good inventory . . . I wanted to make sure they could do an entire season without breakdown" (JA223).

New York Sound (hereafter "NYS") was chosen by Killian as the private vendor to provide sound amplification at Bandshell events. NYS was selected because "[t]hey had the most extensive state-of-the-art equipment and they had the most backup and they had extensive outdoor experience" and the lowest bid (JA224). NYS provided sound amplification at every event in 1986 except for the Rock Against Racism event (JA224-225). Killian stated that even after NYS was chosen, private sponsors who had put in applications for the 1986 season were sent a "tech requirement form" to fill out by which they could advise NYS as to what type of sound equipment, such as microphones, speakers and amplifiers, they would need at their event (JA61-63, 225).

Killian acknowledged that after NYS was chosen, all the private sponsors were concerned (JA226). However, no sponsor canceled, and of the 50 to 60 amplified events which Killian attended in the 1986 season that NYS worked (JA226-228), including speeches, poetry, dance, theatre, jazz, opera and children's groups, no one expressed dissatisfaction or complained that the quality of the sound provided was inadequate (JA226-227). At the amplified events, "[t]he private sponsors would designate one person to be at the mixing board* and to say to the [NYS] technician what their preference on sound quality was" (JA229). Killian believed that "[NYS] tried to reflect the sponsor's interest as best as possible" (JA229). NYS provided a "consistency factor" because of its familiarity with the outdoor concert ground and the shell itself (JA244).

---

* As explained by RAR's sound technician, ALAN THOMPSON, the mixing board is a console that combines all the sound signals from individual microphones placed before vocalists or instrumental performers, and "mix(es) them into one signal and feed it into the sound system" (JA100). The mixing board balances all of the sound signals "together to sound right to [the performer or group's] taste" (JA100). The mixing board also contains the master volume controls (JA120-121).

Robert Russo, the Deputy Commissioner of Operations for the Department of Parks and Recreation, stated that Joseph Killian was hired to manage the Bandshell because of the multitude of events as well as bring in additional events (JA331-333). In discussing the question of Bandshell regulations, Russo advised Killian "that we had lots of groups who came in and had varying abilities to produce an amplified sound. Some didn't amplify at all, some had . . . would come with their own systems, and I thought we should do something to make this more efficient, to manage it for all the groups, for each and every group that came in . . ." (JA333). Russo also noted: "Some [groups] were unable, for example to even get somebody to amplify sound for them and they would come to us and ask us to do it and we were unable" (JA333). Russo had advised Killian that the Parks Department "had gone to court about the volume of the sound amplification at this event, Rock Against Racism and that the Parks Department people, [Russo] included, felt that it was excessive, and that we had gotten some complaints over the years, several years about the excessive sound. . ." (JA335).

Russo recommended to Killian that the Bandshell regulations should give the City the power to control sound level at the Bandshell site (JA336-337). After discussing a number of options and rejecting the idea of a predetermined decibel level, the Parks Department agreed that a reputable sound amplification outfit should be hired, as amplification was outside the Parks Department expertise (JA337).

Directing his attention to the 1985 RAR event, Russo stated that "as far as the event [was] concerned, I had no problem with the event. It has occurred for years and I would not disapprove that. I didn't then and I don't now" (JA341). Russo's problem with RAR was "loudness of sound" (JA342).

Russo acknowledged that he had characterized RAR in a court proceeding as "dishonorable" (JA341). Russo based his opinion on the fact that the negotiations with RAR were always

very difficult and, even when they agreed to terms, RAR would violate the agreements (JA342-343). Russo summarized his experiences with RAR as follows (JA343):

> I think almost every year that I had experience with the [RAR] concert, the performance, the event extended over the time that we agreed that it should be ended. More vehicles were always brought into the park in the events that I remember than we had agreed to. We asked the license plate numbers of the vehicles so we could give them permits, so the people who were at the gates when the park is closed can let the vehicles in. They were never submitted. Vehicles were unregistered that came into the park. Vehicles were given summonses that were never paid. Environmental Control Board summonses were given out. They were never paid, they defaulted.
>
> That's why I say they are dishonorable. . .

Russo also noted that there was always a problem with the volume of sound at RAR events. RAR personnel would be asked to turn down the volume (JA345). "[S]ometimes they would comply and sometimes they would not" (JA345). Russo noted that the sound was so loud, it could be heard in the residential neighborhood of Central Park West (JA345). Usually, the police would ask RAR to turn down the volume, but often an argument would ensue (JA346-347). Russo remembered one RAR concert during which the police asked that the volume be turned down, and someone got up and told the crowd that the "pigs" (referring to the police) wanted the sound turned down (JA346-347). According to Russo, this "could rile the crowd up and the crowd would yell, and it's not nice to be there when this happens" (JA347). Noting that RAR could not be relied upon to voluntarily comply to turn down sound, Russo stated that "they want the sound I think as loud as it can possibly go" (JA347). Summonses for excessive noise had been issued on occasion, but RAR never paid

any of the fines (JA343). After stating that he had no opinion regarding the content of RAR's speech, Russo said:

> . . . The issue for me is loudness. I have to be able to—there has to be a point where I think one group's rights to amplify sound to the ears of all the other users in the park—somebody has to say "I think this is loud enough". . . (JA347).

William Dalton, the Chief of the Urban Parks Service for the New York City Parks Department, oversees the operations of the Parks Enforcement Patrol, who are peace officers deputized by the Police Department to enforce park rules and regulations (JA124-125). He is also in charge of the communications division for the Parks Department (JA125). From 1983 through 1986, Dalton was on-site for the RAR events as he was in charge of security and safety (JA126).

Dalton indicated that in 1986 there were complaints about the sound level at the RAR event (JA127). Most of the complaints came from the west side of the park, Central Park West and the side streets (JA127). The complaints centered on "loud noise," "too loud" and "too much amplification of Bandshell concert" (JA141). Dalton thought that the number of complaints received for the Sunday RAR event were disproportionate to any other Sunday event (JA138).

Dalton was aware of disputes between members of the Police Department and RAR sponsors regarding sound levels at their event (JA127). A representative of the police would ask Dean Tuckerman[7] of RAR to turn down the volume (JA127). Mr. Tuckerman objected to the request (JA129). Sometimes "the sound was turned down" and "at times, it wasn't" (JA129). Said Dalton: "It was an ongoing request by the Police Department because the sound levels would change constantly during the day" (JA129).

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[7] DEAN TUCKERMAN testified on behalf of RAR, describing his work with the oranization as involving applying for permits, organizing speakers and groups and providing some of the publicity.

Dalton noted that after those times that the sound was turned down, it would rise again (JA130-131). And then the police would ask that the sound be turned down. Dalton described it as "a constant scenario" (JA131).

Dalton recalled in 1983 and 1984 that the police "pull[ed] the plug" on the sound system at the RAR event (JA140). Both times that the plug was pulled, the RAR event had continued beyond the time allowed on the Parks' permit (JA140-141).

c. How the Sound Company Was Chosen to Amplify Sound Events at the Bandshell.

Gary Floyd was hired by Joseph Killian to assist him in evaluating proposals by independent sound companies who submitted proposals for sound amplification for events at the Bandshell (JA145-146). At the time he was hired, Floyd was a self-employed consultant for sound, lighting and staging for performance and theatrical events (JA141). He had been working in the area for 17 years (JA141). His prior experience included his having been in charge of site planning and technical coordination for the Smithsonian Institution's American Folk Life Festival held on the mall in Washington, D.C. (JA142). Floyd had also staged several outdoor events for North Carolina's Department of Cultural Resources (JA143-144). Much of Floyd's work involved the evaluation of sound systems for events that he was involved in.

Killian and Floyd generated a list of minimum requirements for the solicitation of bids from sound companies (JA148). Thereafter, they reviewed proposals from 16 sound companies (JA148). Because the proposals were not submitted in a uniform manner, some coming in the form of a letter, others as a list of inventory, Floyd summarized the proposals on a "tubular form" whereby he and Killian were able to compare equipment inventory and prices of each company (JA149-150).

Floyd's final recommendation to Killian was based on three factors. First: Floyd considered the inventory each company

could provide for a Bandshell event (JA152). Floyd was concerned whether the bidding sound companies had the ability to provide a complete inventory for any event (JA153). Floyd was careful to obtain this information not only from the submitted proposals but in follow-up phone conversations with the bidders (JA154). Second: Floyd spoke with contractors who had used the services of the bidders. (JA152). Third: Floyd spoke directly with each of the companies, as he was looking for more than a sound company (JA152).

> . . . [W]e look for somebody who isn't just there to put up a microphone that's turned on and collects the check at the end of the day. We look for a company that's very involved, that provides a professional demeanor, a professional style in the performance situation, a company that provides a lot of expertise and assistance to the performers to make them as professional as possible. In a number of instances of the types of programs that Central Park has produced this was of great benefit I think to some of the performers (JA152).

On this basis, Floyd recommended that NYS be hired to provide sound amplification at Bandshell events (JA153).

NYS was hired by Killian on a trial basis for nine performances before he decided to hire them for the entire 1986 season (JA155). In this way, Killian had a chance to determine whether NYS was satisfactory both in their competence technically and in their ability to work with the performers (JA155). Floyd reviewed the work of NYS on 12 different occasions (JA156). He wanted to determine if they were fulfilling their obligations (JA156). At the first event, Floyd provided an evaluation of the quality of the sound and made some suggestions for changing the placement of speakers (JA157). He also took some sound measurements around the perimeter of the Bandshell area (JA157).

As a result of taking the sound measurements, Floyd had some backs of the speakers raised so "that their coverage was

more directed towards the audience area directly" (JA169). Floyd believed this change "would provide a better sense of coverage and more enclosed area of sound rather than trying to send sound out beyond the particular audience area" (JA169). Floyd found that NYS provided more than enough equipment for Bandshell events particularly as it was only running at approximately one-third of its given capacity (JA158).

Without identifying himself, on several occasions, Floyd spoke to on-site performers as to whether they would hire NYS (JA159). Floyd found that the reaction was generally positive (JA159). There was no indication from any of the performers in the 1986 season that NYS's services were less than adequate (JA160-161). In fact, Floyd learned from Killian that NYS was contracted by some of these same performers for services needed at concerts held outside of the Bandshell (JA160).

Floyd found that NYS had provided appropriate services for the different types of performers including folk, rhythm and blues, rock and roll, and reggae, which included such instruments as electrified piano, guitars, bass amps, and full drum sets (JA160). Floyd thought that the amplification for the louder events was more than adequate (JA161). As to the question of esthetic balancing, the sound company showed remarkable sensitivity to that problem (JA161). Floyd received no complaints from any audience member that the mix was inadequate (JA161).

A technical questionnaire had been sent by Killian several months in advance to groups that were going to perform (JA61-63, 166). The questionnaire elicited from the performer what his sound amplification needs would be, including speakers and microphones, type of instrument or voice that was to be used. In this way, a particular performer's technical needs could be addressed (JA61-63, 165). NYS also regularly called performers from time to time before the event (JA167). Killian explained, in

this manner performers' needs were served and NYS avoided wasting manpower (JA167-168).

Finally, with regard to the professional competence of NYS's technician, Floyd offered the opinion that

> . . . I think in general they were always agreeable, very helpful, considerate of the performers. In fact I think they supplemented the stage management staff that was there. It was like having two extra, you know, staff members for the overall staff provided by the park services (JA185).

Floyd added: "I think they were very competent. I would not hesitate to use them again" (JA185).

Floyd was also asked whether "the single most important factor in the reproduction of amplified sound . . . is really the person who is working on what is called the soundboard . . ." (JA178). Floyd did not think that was necessarily so (JA178). Floyd explained that while he "place(d) high reliance on the technician at the console knowing what the equipment should do" (JA180), the aesthetic choices still remained with the musician. The technician obtains the necessary information concerning the performer's preference at the beginning of the performance. The performers are very specific about what they like and dislike (JA180). In this way, concluded Floyd, an experienced technician can within a span of "generally five minutes" learn how to provide the desired mix of any band (JA181).

d. How the Sound Level Is Determined at a Bandshell Event.

The District Court took note of paragraph 6 of the City proposed conclusions of law which stated:

> The guidelines seek to regulate sound levels without reference to speech content through a requirement that all sponsors use the sound amplification equipment and

> professional staff retained by the department for all Bandshell events (JA222).

The Court asked Killian "in what manner do the requirements of equipment and staff operate to regulate sound levels" (JA222). Killian explained that "the private sponsor would basically designate one person to be at the mixing board and to say to [the City's hired] technician at the board what their preference on sound quality was" (JA229). In other words, the City's hired sound technicians would set up the equipment and "are actually at the board mixing and listening to it . . . but in terms of regulation, in terms of mix, most sponsors chose to elect someone from their own group to say 'Hey, we need a little bit more on bass or we need a little softer here, a little stronger here' " (JA222).

Killian also stated that the sound level is not set at one volume. "If more people arrive, more bodies are absorbing the sound, you have to bring the level up a bit. It's a great sensitivity and it's a relationship between a delegate from the sponsor and also the technician. In the end, though, that person is [the City's] contractor" (JA223). However, Killian did note that there was no interference between the NYS and a private sponsor by a City employee (JA229-230). NYS's direction from the City was to obtain the best quality production and best mix possible with a concern for containing the sound in the concert ground (JA230).

The Court asked Killian what happens if there is a disagreement about volume (JA222). Killian indicated that "(i)t is [NYS's] hand that is there" (JA223). Though ultimately the determination is made by NYS's technician, Killian explained that when the sound level is too high "you simply go to the sponsor or you bring the sponsor out to that point [of the periphery of the concert ground (JA234)] and then we go to the Board and change it" (JA232). Killian explained further that he would discuss the excessive sound, and the fact that it was bleeding into adjacent areas with the sponsor. Killian could not recall an instance where

a sponsor objected to sound being turned down if it was excessive outside of the concert area (JA236). Said Killian:

> . . . Certainly within the concert ground and within audience parameters there is always discussion, and in all those situations it's deferred to the sponsor to make the judgment in those cases (JA236).

The Volume RAR Recognizes as Too Loud for the Bandshell Is One that Would Cause "People's Ears to Bleed."

Alan Thompson is the sound engineer for RAR (JA100), having worked approximately 200 concerts for the organization since 1980 (JA103). His regular employment is sound reenforcement consultant (JA112). He also "designs systems for people who want to put a sound system in a restaurant or a club or an outdoor farm . . ." (JA112).

On the day of a concert, Thompson's role is primarily to set up and engineer the sound system (JA100). Thompson explained that "(e)ngineering the sound means setting up all the individual microphones on all the individual instruments . . . then it's all plugged into a console that combines multiple signals into one signal which is then fed into a sound system" (JA100). Through the console, Thompson is balancing all the instruments together to suit the performer's taste (JA100). Thompson explained that on the console "between 200 and 300 adjustments can be made, and during the course of a song [his] hands will be moving all over the Board" (JA101). There are eight master volume sliders that control the volume (JA121).

Thompson stated that RAR cannot afford to pay bands that play at their event (JA114). "So what [RAR does] is we rent one [sound] setup which they all share, and to do that we have to provide what they need and what they request" (JA114). In other words, RAR "arrange[s] a common stage set up that is agreeable to all of [the bands]" (JA115). Thompson noted that, if RAR did not provide the sound equipment, bands would have to bring

their own equipment and they would have to charge RAR a very large fee (JA114).

Thompson explained that the sound system contains a device called a "limiter" or a "compressor" which is designed to limit peaks, "so that if an unexpected peak should come through, in other words, if someone would drop a microphone against a floor or scream in the mike all of sudden, this compression would automatically limit the sound. . ." (JA117). The following exchange then took place at trial:

> Q. Given the fact that you do limit the sound that is emitted from the performance of RAR at the Bandshell, do you recognize that there might be a sound level that's unreasonable for [the Bandshell] area?
>
> A. I think a volume that would cause people's ears to bleed would be too loud.
>
> • • •
>
> Q. So you're saying that nothing less than that level would be unreasonably loud?
>
> A. Not really. I would say that a painfully loud—if it was painfully loud that would be unreasonably loud (JA118).

Thompson acknowledged that he was unfamiliar with the quality of equipment provided by NYS, the company hired by the Parks Department to provide sound at Bandshell events (JA123). He also admitted that he had not attended any event at the Bandshell in 1986 during which NYS provided the sound amplification (JA123). During his testimony, RAR neither questioned Thompson nor did Thompson himself suggest a reasonable alternative to controlling loudness at Bandshell events other than having a City-designated sound engineer at the console or mixing board.

The District Court's Opinions

(1)

Originally on May 1, 1986, the District Court preliminarily enjoined the City from enforcing the Use Guidelines "on the basis of a relatively sketchy record" (A37). The Court, in issuing the injunction, indicated that it was under the impression that "the City intended to impose upon RAR a sound system of unknown quality, seemingly under the sole control of an individual owing his allegiance to a City contractor and not to RAR as sponsor of the event" (A37).

After an extensive trial on the amended complaint seeking declaratory judgment that the Use Guidelines were unconstitutional as well as compensatory and punitive damages, the District Court concluded that the Guidelines relating to sound limitations were supported by the evidence. In its Opinion, dated April 6, 1987, the District Court stated that it had learned at trial that the City was concerned that sound generated by Bandshell events was extending unnecessarily beyond the listening area into adjoining sections of the park as well as annoying residents of buildings which adjoin the park (A43). The Court found that the objective of the City in hiring a sound company was to place control of the volume in its hands and ensure the quality of sound at Bandshell events (A40). This approach arose out of the City's concern that amplified sound generated at Bandshell events be sufficient to reach all listeners in the defined concert areas but that the sound not extend unnecessarily beyond the listening area (A43).

After reviewing the evidence concerning the use of New York Sound, the District Court found "that the sponsors of 1986 events at the Bandshell were uniformly pleased with the quality of the amplified sound" (A41).

The Court approved the process by which the Parks Department regulated the sound at the concerts. It explained that amplified sound at a concert consists of two basic components: sound

quality or "mix," and sound volume (A41). A series of stage microphones are placed throughout the performers (A41-42). The sounds picked up by these microphones are fed into a "mixing board" at which New York Sound's engineer presides. His adjustments at the board control the mix of sound which is then amplified through a series of speakers (A42). " The City's practice for events at the Bandshell is to give the sponsor autonomy with respect to the sound mix: balancing treble with bass, highlighting a particular instrument or voice, and the like" (A42). The District Court noted that "[t]he New York Sound engineer does all that he can to accommodate the sponsor's desires in those regards" (A42).

The District Court recognized that sponsors of the Bandshell events are entitled under the First Amendment to content neutral regulations that guarantee them a level of sound amplification reasonably necessary to carry their message to the outer boundaries of the audience area (A45). But it noted that "a user has no right, First Amendment or otherwise, to turn up the volume as loud as it wishes" (A45). The City has a legitimate governmental interest in controlling excessive sound (A44), and its interest in preserving the quality of urban life "is one that must be accorded high respect" (A44).

The Court accepted that RAR had a First Amendment right to use of a sound amplification system capable of producing the quality of sound it desires (A46). But the Court did not "detect a First Amendment right to own the sound amplification system used" (A46). It found that "the City's implementation of the Bandshell guidelines provides for a sound amplification capable of meeting RAR's technical needs and leaves control of the sound mix in the hands of RAR" (A46-47). The District Court observed that "RAR's interest in using its own equipment and sound engineer is, in the circumstances revealed the evidence, 'attenuated' at best" (A47).

In upholding the guidelines, the District Court noted that these regulations satisfied the principles set forth by this Court. The regulations are sufficiently narrowly tailored to further the legitimate state interest. The District Court noted that prior efforts of Parks Department's representatives to reduce RAR's sound levels had been unavailing and confrontational (A47). It concluded that "[d]irecting a New York Sound technician to turn down the sound in case of need is less intrusive than pulling the plug . . ." (A47-48).

(2)

After issuance of the District Court's opinion, RAR moved to amend the judgment to clarify whether the District Court's Opinion of April 6, 1987 allowed RAR to "actually control the mixing board and sound system." By its Memorandum Opinion, dated April 30, 1987, the District Court interpreted RAR's motion to "suggest" that the City-designated technician "is not able properly to implement a sponsor's instructions as to sound quality or mix" (A89). Significantly, the Court found:

> No evidence to that effect was offered at trial; as noted, the evidence is to the contrary (A89).

Accordingly, the District Court expressed its intention that control of the mixing board would be in the hands of the City-designated technician (A88). However, the technician, the District Court ordered, "is required to defer to the sponsor's desires as to sound quality, but not to the sponsor's demands for increased volume, subject only to those constitutional entitlements described in the prior opinion" (A88-89). In other words, the District Court not only found that the Guidelines did not infringe on RAR's First Amendment rights, but it "ordered" the City to follow the Guidelines in order to insure that RAR's rights remained intact.

The Court of Appeals' Opinion

The Court of Appeals purported to apply the same principles as the District Court in reviewing the disputed guidelines. It

recognized that content neutral time, place and manner regulations are permissible so long as they are narrowly tailored to serve a substantial government interest and do not unreasonably limit alternative avenues of expression (A11). The Court noted "[h]owever, the method and extent of such regulation must be reasonable, that is, it must be the least intrusive upon freedom of expression as is reasonably necessary to achieve a legitimate purpose of regulation (citations omitted)" (A12).

Finding that "the city's express purpose is to prevent the noise generated at the bandshell from intruding upon those who do not choose to attend or hear the musical presentation" (A12-13), the Court of Appeals held the City's regulation valid only to the extent necessary to control volume (A18). The Court stated that "[r]estriction to use of the city's choice of sound systems is not shown to be necessary to control noise levels. Any system has a volume control." (A17).

In holding that the Parks Department could alleviate the problem solely by a volume control which could override all sound systems, the Court of Appeals ignored the evidence of the inexperience of some Bandshell users in producing an event in the outdoors and the inadequacy of equipment of some users with resulting inadequate amplification levels and disappointed and unruly crowds (JA30). In applying its least restrictive alternative standard, the Court recognized the inadequacy of its own suggestion that a volume limiting device in the possession or control of the City-employee would always be a solution (A18-19). In the event the City could not devise a method to control volume that meets the least intrusive standard, the Court concluded: ". . . the plug can be pulled on the sound to enforce the volume limit" (A21 n.6). In reaching this conclusion, the Court did not acknowledge the substantial risk to public safety and park property that such a volume control method might create.

Finally, the Court of Appeals concluded that the City's regulations somehow standardized a musician's expression (A21). No

facts were cited by the Court to substantiate its conclusion, nor was reference made to the District Court's fact-finding that the evidence at trial demonstrated that the sponsor's instructions regarding sound quality or mix would be achieved under the City's Use Guidelines (A89).

The Court of Appeals upheld the District Court's judgment in so far as it sustained the right of the City to limit volume of performances at the Bandshell (A22). It reversed that portion of the District Court judgment which had upheld the Use Guidelines requirement of the use of a designated sound engineer and sound system (A22).

SUMMARY OF ARGUMENT

(1)

The fundamental issue is what constitutional test is to be applied in determining whether content-neutral regulations of expression applied to a public forum are "narrowly tailored" to their government purpose. This Court has stated that whether regulations are sufficiently tailored "must be evaluated in terms of their general effect." *United States* v. *Albertini*, 472 U.S. 675, 689 (1985). Such regulations are not invalid simply because there is some imaginable alternative that might be less burdensome to freedom of speech. *Clark* v. *Community for Creative Non-Violence*, 468 U.S. 288, 299 (1984). Similarly, the validity of such regulations does not turn on a judge's agreement with the responsible decision maker concerning the most appropriate method for promoting significant governmental interests. *Id*. Instead, it is the duty of the judiciary to determine whether the local authority, entrusted with the management and protection of the local public forum and its environs, has enacted regulations that, though incidental in their impact on speech, are neutral in purpose and promote a substantial government interest that would be achieved less effectively absent the regulation. *United States* v. *Albertini*, *supra*, 472 U.S. at 689.

(2)

Joseph Killian, Program Director for the Naumberg Bandshell located in Central Park, was confronted with a long history of excessive noise from Bandshell events interfering with the use of the park by persons who came simply to relax and disturbing nearby residents. With the assistance of a professional sound consultant, Killian devised Use Guidelines that required users of the Bandshell to use a professional sound engineer and state-of-the-art sound equipment provided by a sound company hired by the City.

The practice of the Parks Department was to allow the sponsor of an event at the Bandshell to designate a representative to direct the sound company's engineer as to how their sound was to be "mixed," but ultimate control of the volume remained with the City. In this manner, the City was able to delimit the bleed of sound beyond the perimeter of the Bandshell area while performers were provided with the mix they wanted.

The United States Court of Appeals for the Second Circuit held that the Use Guidelines promulgated by the Parks Department requiring permittees of the Naumberg Bandshell in Central Park to use the City-hired sound company's sound system and sound technician were unconstitutional in that the designated method of regulating the volume of sound was not the "least intrusive" upon the freedom of expression. In so finding, the Second Circuit apparently attached little significance to 1) the testimony of Joseph Killian which disclosed that he had considered alternative methods for reducing volume as impractical before adopting the solution contained in the Use Guidelines; 2) the observations of Killian of the production of 50 to 60 amplified events including speeches, poetry, dance, theatre, jazz, opera and children's groups using the City-hired sound company and the fact that no one expressed dissatisfaction or complained that the quality of the sound provided was inadequate or claimed that their right of expression was infringed; 3) the finding of the trial court that, as a

matter of fact, the sound engineer hired by City could and would provide the mix desired by the users of the Bandshell; and 4) the admission by Rock Against Racism that it had never used the City-hired sound company or witnessed an event produced by the company and therefore was not familiar with how the sound company produced a Bandshell event.

(3)

The Court of Appeals did not disagree with the District Court holding that the City had the right to regulate excessive noise in the Bandshell with content-neutral time, place and manner regulations. But in a literal application of the "least intrusive" principle, it held that while the City could retain control of the volume emitted from the loudspeaker system in some undefined fashion, it could not participate in the mixing of sound.

In dictating how the City should control loudness at the Bandshell, the Second Circuit improperly substituted the judgment of the court for that of the locality in determining what is an appropriate time, place and manner regulation. The inappropriateness of the least intrusive standard test is highlighted by the Circuit Court's suggestion that if there is no method whereby the City could control only volume, the City could "[a]s a last resort," pull the plug to enforce the sound limit. It does not have to be emphasized that "pulling the plug" during a concert before a large excited audience is not a practical alternative.

The Court of Appeals failed to address itself to any of the local problems—including technological feasibility and the risk to public safety and park property were the plug to be pulled on an event—that confronted the Parks Department when it devised its regulatory scheme. Moreover, the Circuit Court, while alleging that the City's regulation "standardized" expression, simply ignored the fact-finding by the District Court that the evidence adduced at trial had demonstrated that artistic expression at the Bandshell remained intact with the Guidelines because the City-

designated sound technician at the Bandshell had to follow the "sponsor's instructions as to sound quality or mix."

(4)

The decision of the Court of Appeals for the Second Circuit ignores the holdings of this Court that due deference must be accorded regulatory bodies which fashion regulations that are attuned to the problems of the locale and which are in a better position to make remedial determinations than a court, particularly where the challenged regulations are content-neutral. *See, Clark* v. *Community for Creative Non-Violence, supra,* 468 U.S. at 299. The least intrusive standard used by the Second Circuit has never been a part of the inquiry of a time, place, manner restriction. *Regan* v. *Time, Inc.*, 468 U.S. 641, 657 (1984). Instead, as this Court has mandated in such cases as *Clark* v. *Community for Creative Non-Violence, supra,* and *United States* v. *Albertini, supra,* a content-neutral regulation need only be so narrowly tailored as to substantially serve the legitimate ends of government. The judiciary has not been assigned the authority to replace the Department of Parks and Recreation as manager of Central Park. *Clark* v. *Community for Creative Non-Violence, supra,* 468 U.S. at 299. Instead, where the Parks Department has enacted regulations that serve the interests of its citizens in limiting the assault of loud noise from Bandshell events while still allowing users of the Bandshell, as found by the trial court, to musically express themselves without their aesthetic tastes being compromised, then the City's Use Guidelines must be found narrowly tailored so as to pass constitutional muster and any judicial interference therewith cannot be justified.

(5)

Even assuming that the Court of Appeals' least intrusive principle is the applicable standard to be applied, the Guidelines satisfy that standard. The control of the volume and mix by a sound engineer independent of the Bandshell user is the only feasible method of assuring that a public event such as a concert will

not intrude on other users of the park nor disturb nearby residents.

ARGUMENT

THE NEW YORK CITY DEPARTMENT OF PARKS AND RECREATION'S USE GUIDELINES ARE CONSTITUTIONAL AS THEY MEET THIS COURT'S TEST OF REASONABLE TIME, PLACE AND MANNER RESTRICTIONS BY GOVERNMENT WITH ONLY INCIDENTAL IMPACT ON THE EXERCISE OF FIRST AMENDMENT RIGHTS. THE PARKS DEPARTMENT'S DETERMINATION AFTER LENGTHY STUDY, AS REFLECTED IN THE USE GUIDELINES, TO REQUIRE SPONSORS OF EVENTS AT NAUMBERG BANDSHELL, A PUBLIC FORUM, TO USE A CITY DESIGNATED PROFESSIONAL SOUND ENGINEER, WHO WAS REQUIRED TO PROVIDE THE ESTHETIC MIX DICTATED BY SPONSORS AND A SOUND SYSTEM TAILORED TO THE INDIVIDUAL REQUIREMENTS OF SAID SPONSORS, AFFORDED USERS OF THE BANDSHELL UNFETTERED EXPRESSION TEMPERED ONLY BY THE NECESSARY REGULATION OF LOUDNESS TO PROTECT THE RIGHTS OF OTHER USERS OF THE PARK AND NEARBY RESIDENTS.

(1)

This Court has developed a well- established body of case law setting forth the standards of review of governmental regulations which impact on the exercise of free speech. Regulations enacted for the purpose of restraining speech on the basis of its content "presumptively" violate the First Amendment. *City of Renton* v. *Playtime Theatres,* 475 U.S. 41, 46-47 (1986). However content-neutral time, place and manner regulations are permitted if they are narrowly tailored to serve a substantial governmental interest and leave ample alternative avenues of communication. *Clark* v. *Community for Creative Non-Violence,* 468 U.S. 288, 293 (1984); *Perry Education Ass'n* v. *Perry Local Educators Ass'n,* 460 U.S. 37, 45 (1983); *Heffron* v. *International Society for Krishna Consciousness,* 452 U.S. 640, 648 (1981).

Content-neutral restrictions are those restrictions that are "justified without reference to the content of the regulated speech." *Boos* v. *Barry*, __ U.S. __, 108 S. C t. 1157, 1163 (1988), citing, *City of Renton* v. *Playtime Theatres, Inc.*, 475 U.S. 41, 48 (1986). In the case at bar, the Use Guidelines were applied without any reference to the content of any Bandshell user's speech (JA25, 36, 211). They were justified by the City's concern with maintaining a measure of tranquility in the urban environment by turning down the volume of Bandshell events in Central Park.

"The police power of a state extends beyond health, morals and safety, and comprehends the duty, within constitutional limitations, to protect the well-being and tranquility of a community." *Kovacs* v. *Cooper*, 336 U.S. 77, 83 (1949). Numerous cases recognize the City's interest in regulating sound levels. *See e.g., Frisby* v. *Schultz*, _U.S._, 108 S. Ct. 2495, 2502 (1988) (Government may protect individuals from the intrusion of unwanted speech into their homes.); *Grayned* v. *City of Rockford*, 408 U.S. 104, 119 (1972) (antinoise ordinance was a reasonable regulation; appellant's conduct interfered with the rights of others); *Kovacs* v. *Cooper, supra*, 336 U.S. 77 (1949) (ordinance upheld prohibiting use of sound amplifiers emitting "loud and raucous noises").

As this Court stated in *Members of City Council* v. *Taxpayers for Vincent*, 466 U.S. 789, 806 (1984):

> In upholding an ordinance that prohibited loud and raucous sound trucks the Court [in *Kovacs* v. *Cooper*] held that the state had a substantial interest in protecting its citizens from unwelcome noise... [M]unicipalities have a weighty, essentially esthetic interest in proscribing intrusive and unpleasant formats for expression.

The City's interest is no less significant where a park is involved. If anything, the preservation of Central Park in an urban environment for quiet relaxation, passive recreation, and appreciation of

nature suggests that the governmental interest is even more significant. *See, Clark* v. *Community for Creative Non-Violence, supra*, 468 U.S. at 296 (citing "the Government's substantial interest in maintaining the parks in the heart of our Capital in an attractive and intact condition, readily available to the millions of people who wish to see and enjoy them by their presence").

This Court has repeatedly held that the First Amendment does not bar the application of neutral regulations that incidentally burden speech. *Consolidated Edison Co.* v. *Public Service Commission.*, 447 U.S. 530, 535-536 (1980). Regulations that do burden speech incidentally or control the time, place, and manner of expression must be evaluated in terms of their general effect. *United States* v. *Albertini*, 472 U.S. 675, 689 (1984). Such regulations are not invalid simply because there is some imaginable alternative that might be less burdensome on speech. *Clark* v. *Community for Creative Non-Violence, supra*, 468 U.S. at 299. Instead, an incidental burden that is no greater than is essential is permissible so long as the neutral regulation promotes a substantial government interest that would be achieved less effectively. *United States* v. *Albertini, supra*, 472 U.S. at 689. "The validity of such regulations does not turn on a judge's agreement with the responsible decision maker when concerning the most appropriate method for promoting significant government interests." *Id.* Accordingly, such regulations are not invalid simply because there is some imaginable alternative that might be less burdensome to freedom of speech. *Clark* v. *Community for Creative Non-Violence, supra*, 468 U.S. at 299. In other words, less or least restrictive analysis is not and has never been part of the inquiry into the validity of a time, place, manner restriction. *Regan v. Time, Inc.*, 468 U.S. 641, 657 (1984). *See, City of Wateska* v. *Illinois Public Admin. Council*, _ U.S. _, 107 S. Ct. 919, 920 (1987) (Chief Justice Burger and Justices White and O'Connor dissenting.)

Rule making by local authorities entrusted with the management and protection of their local public forums and their environs is to be accorded due deference based on their expertise.

White House Vigil v. *Clark*, 746 F. 2d 1518, 1531 (D.C. Cir. 1984). The judiciary has not been assigned the authority to replace local authorities and to engage in judicial rule making. *Clark* v. *Community for Creative Non-Violence*, *supra*, 468 U.S. at 299. Because a city's interest in attempting to preserve the quality of its urban life must be accorded high respect, local regulators must be afforded an opportunity to formulate solutions to serious problems. *Young* v. *American Mini Theatres, Inc.*, 427 U.S. 50, 71 (1976). Courts simply are "not in a position to evaluate the feasibility of administration and enforcement of regulations, as are the agencies, who are therefore properly charged with drafting them." *White House Vigil* v. *Clark*, *supra*, 746 F. 2d at 1529 n.83.

(2)

The Parks Department employees properly applied the principles of this Court in establishing content-neutral regulations that are narrowly tailored to the City's substantial interest in maintaining the tranquility desired by the vast majority of users of Central Park and by nearby residents. In the center of the most heavily used portion of Central Park lies the Naumberg Bandshell (JA214). For years, sound amplification of events at the Bandshell had not only disturbed residents of nearby neighborhoods, but it conflicted with the enjoyment of the park by other park users (A43). Faced with the fact that 80 percent of the users of the park came simply to relax (JA29), the Department of Parks and Recreation sought to resolve the conflict between audiences at Bandshell events and nearby relaxing park users. To do this, they hired Joseph Killian as the first Program Director of the Bandshell.

As Program Director of the Bandshell, Killian undertook a study of those City departments that had responsibility over the Bandshell (JA26). He interviewed key individuals in those departments (JA26). He then reviewed reports of maintenance and operation crews at Bandshell events (JA26). He also reviewed detailed reports of events held at the Bandshell as well as park studies (JA26). Based on his investigation, he discovered a bureaucratic maze that hindered permit applicants for the Bandshell (JA24).

Importantly, in terms of this appeal, Killian found that excessive sound amplification at Bandshell events, which was annoying other park users and nearby residents, was rooted in two contexts. One, as exemplified by concerts sponsored by RAR, was that sponsors would not reduce sound levels as requested by authorities on the scene (JA129-131, 345-347). Second, excessive sound was also caused by groups using the Bandshell who were unfamiliar with sound amplification in an outdoor setting and who sometimes came with inadequate equipment for their events (JA189-190, 218).

The Use Guidelines were drafted in direct response to this study. The Use Guidelines eliminated the bureaucratic maze so that permit applicants had only to apply at the Bandshell's Program Director's office for the required vehicle, special event and sound permits (JA373-374). The Use Guidelines also regulated the manner and use of sound amplification, the hours and dates for events, the number of spectators, toilets, public safety, vehicles in the park and clean-up in order that events could be safe, orderly and considerate of the rights of other park users and nearby residents (JA374-378).

The Use Guidelines were content neutral. They applied to all applicants seeking use of the Bandshell without regard to the content of speech to be employed at their particular event (JA25, 211). The time, place and manner restrictions applied to applicants without regard to the type of event (JA211).

To the extent the Guidelines regulated sound, they were justified without reference to the content of speech. *Boos* v. *Barry*, __ U.S. __, 108 S. Ct. 1157, 1163 (1998), *citing*, *City of Renton* v. *Playtime Theatres, Inc.*, 475 U.S. 41 (1986). The basis of the justification was the fact that by regulating volume, the Guidelines were concerned only with the secondary effects of amplified sound on

the surrounding community and park areas. Similarly, by providing a professional sound engineer to regulate the mix, the City sought to control excessive amplification by groups with either inadequate equipment or experience to properly produce a Bandshell event. Such regulation of the secondary effect of communication, rather than the content of speech, has been found not to impermissibly infringe upon the free exercise of First Amendment rights. *City of Renton* v. *Playtime Theatres, Inc., supra,* 475 U.S. at 47. This is particularly true where the City has demonstrated that the restriction of amplified sound is justified by the significant interest of affording all park users the benefits of the park while allowing nearby residents the quiet enjoyment of their dwellings. *See, Kovacs* v. *Cooper, supra,* 336 U.S. at 89. (1949).

(3)

The nature of a place, "the pattern of its normal activities, dictate the kinds of regulations of time, place, and manner that are reasonable." *Grayned* v. *City of Rockford, supra,* 408 U.S. at 116. The well-developed record below, which included five days of trial testimony, demonstrated that the City met this standard of reasonableness. Joseph Killian found that Central Park was used by City dwellers for any number of different reasons, including relaxation, nature, music and sports (JA40-41). Trying to accommodate these diverse purposes, Killian circumscribed a Bandshell user's freedom of speech only to the extent that the volume of their message was limited to the audience that attended their event. Thus, rather than abridge or regulate anyone's expression, the City merely limited the volume of an event so that others could use the park in ways they deemed as important as RAR's desire to convey its message. Such a result is compatible with the normal activities of the park at the time of RAR's concert. The City had a right to turn down RAR's overamplified assault on its citizenry. *Kovacs* v. *Cooper, supra,* 336 U.S. at 88.

The Use Guidelines also left RAR and all Bandshell users with ample alternative channels for communicating their message. Neither RAR nor any sponsor was denied access to the Bandshell by the Use Guidelines. The Use Guidelines only placed reasonable limitations on the sound level so that audiences at Bandshell events could hear while minimizing sound intrusions on other park users. Moreover, the Parks Department assured the performers that by providing sound controlled by an independent professional sound company, the limitations would not affect their artistic expression. Indeed, the sound company hired by the Parks Department, New York Sound, provided Bandshell users with state-of-the-art sound equipment tailored to their specifications (JA61-63, 224-225) and professional sound system technicians to produce their concerts (JA224). Therefore, while the sound system provided and controlled by the Parks Department may not have been RAR's preferred mode of expression, it is undeniable that it did not prevent anyone from delivering to the public their intended message. *Clark* v. *Community for Creative Non-Violence, supra,* 468 U.S. at 295 (1984) (the prohibition against sleeping overnight in the park was not a barrier to delivering to the public by other means the intended message concerning the plight of the homeless); *Olivieri* v. *Ward,* 766 F.2d 690, 694 (2d Cir. 1985), *cert. den.* _ U.S. _, 107 S. Ct. 1371 (1987) (plaintiff's "group is not being stopped from conveying its message. They are merely not being allowed their preferred forum for demonstration.") Moreover, numerous other park bandshells and many other suitable concert spaces were available throughout the City, should RAR have believed or found that the Central Park Bandshell was no longer appropriate (JA36).

(4)

As demonstrated during trial, the Parks Department's decision to provide a sound system tailored to the sponsor's specifications for each Bandshell event was based on two specific governmental interests. First, sound amplification at the Bandshell had, on a regular basis, conflicted with the enjoyment of the park by other park users and disturbed residents in nearby,

park-adjacent buildings (JA28, 212-213). The Parks Department had consistently received complaints from residents who live along the park about the noise of weekend musical events (JA212-213). Second, groups sponsoring events a the Bandshell were often unfamiliar with sound reproduction outdoors and often either did not know how to amplify sound outdoors properly or used inadequate equipment (JA189-190, 218). Moreover, Joseph Killian ascertained that differences in temperature, foliage and audience size made picking out a single decibel level difficult, if not virtually impossible on a one-time basis (JA220, 285-286, 285-286).

The Parks Department determined that many of the complaints concerning excessive sound levels at the Bandshell were avoidable with proper amplification techniques (JA29). Thus, to address the concerns of excessive sound levels and poor amplification, and to accommodate the interests of other park users, nearby residents, and those attending the performance, in accordance with the Use Guidelines, the Parks Department hired a professional sound company, New York Sound, because it had the "ability to provide a complete [sound] inventory for any event" (JA153) and was able to devise and provide a proper sound amplification tailored to both the needs of the sponsor and the environment of the Bandshell (JA30, 61-63, 153, 166-167).

The Use Guidelines required the sound engineer to control the "mixing board," that is, he would make those adjustments at the board that would control the mix or relative volume of each instrument and/or vocalist which was in turn amplified through a sound system. But as found by the District Court (A42), the sound engineer was required to defer to the wishes of the sponsor with regard to the "sound mix" as long as the sound did not bleed excessively into other park areas (A7, JA222, 236-237). The District Court also found that in this manner, the City's sound engineer was able to provide the sponsor with the mix he desired

(A89). Similarly, control of the volume would remain with the sound engineer. These regulations properly balanced the need to preserve the performer's right to convey his message with the equally compelling need to minimize the amount of sound that bled unnecessarily beyond the listening area into adjoining sections of Central Park where other park users might be pursuing other forms of recreation.

(5)

In rejecting the Department of Park's accommodation of free expression for both Bandshell users and nearby park users and residents, the Second Circuit disregarded this Court's view of reasonable time, place and manner restrictions. Finding that the City had the right to regulate noise levels (A13), the Circuit Court ruled that "the method and extent of such regulation . . . must be the least intrusive upon freedom of expression as is reasonably necessary to achieve a legitimate purpose of regulation" (A12).[9] With this overly narrow focus, the Circuit Court concluded that absent a technological method for controlling volume and only volume at Bandshell events, the City could "as a last resort" pull the plug on an event. The Circuit Court expressed no thought regarding the practicality of "pulling the plug" during a concert before a large excited audience. Moreover, the Circuit Court gave no credit to the finding by the District Court that, as a matter of fact, RAR had produced no evidence that any sponsor's artistic expression had been compromised by use of the City's sound system and sound engineer (A89). *Compare, Reeves* v. *McConn*, 631 F.2d 377, 387 (5th Cir. 1980).

Nor did the Circuit Court take into account the fact that RAR's criticism of the regulation as it applied to artistic expression was based on pure speculation. RAR was totally unfamiliar

[9] The Second Circuit has recently also applied the "least restrictive standard" to the regulation of commercial speech. *Fox* v. *Bd. of Trustees of the State University of N.Y.*, 841 F.2d 1207, 1214 (2d Cir. 1988), *cert. granted*, _U.S._, 57 U.S.L.W. 3200 (October 3, 1988) (No. 87-2013).

with the production of an event by the City-hired sound company. No RAR witness had ever attended an event at the Bandshell during which New York Sound, the City-hired sound company, provided sound amplification (JA123). In contrast, there was evidence adduced at trial that Killian had observed 50-60 events at the Bandshell in which New York Sound had participated and not one sponsor or musician had objected to the sound quality (JA226-227). Their criticism, therefore, is hardly a basis to overrule the District Court's determination that the City-designated sound engineer would control the mix to reflect the expression of the performers (A46-47).

(6)

The Second Circuit applied the least restrictive standard despite this Court's clear and repeated refusal to adopt this test. "The less-restrictive-alternative analysis . . . has never been a part of the inquiry into the validity of a time, place, and manner restriction. It is enough that the restriction substantially serves the Government's legitimate ends." *Regan* v. *Time, Inc.*, 468 U.S. 641, 657 (1984). See, *City of Wateska* v. *Illinois Public Admin. Council*, ___ U.S.___, 107 S. Ct. 919, 920 (1987) (Chief Justice Burger and Justices White and O'Connor dissenting). *In Clark* v. *Community for Creative Non-Violence*, *supra*, 468 U.S. at 299, this Court, in addressing directly the contention that a National Park Service regulation prohibiting sleeping in a park as part of a demonstration to call attention to the plight of homeless, was unconstitutional because a lower court could hypothesize a less speech restrictive alternative, stated:

> We are unmoved by the Court of Appeals' view that the challenged regulation is unnecessary, and hence invalid, because there are less speech restrictive alternatives that could have satisfied the Government interest in preserving park lands.

In *United States* v. *Albertini*, *supra*, 472 U.S. at 675, this Court confronted the claim that the general exclusion of recipients of

so-called "bar letters" from military open houses failed under the First Amendment "because it is greater than is essential to the furtherance of Government interests in security of military installations." Rejecting the narrowness of this standard, this Court, in holding that "focusing on whether there were conceivable alternatives to enforcing the bar letter" provides an answer to the wrong question, stated (472 U.S. at pp. 688-689):

> The First Amendment does not bar application of a neutral regulation that incidentally burdens speech merely because a party contends that allowing an exception in the particular case will not threaten important government interests. See *Clark* v. *Community for Creative Non-Violence*, 468 U.S. 288, 296-297 (1984) ("the validity of this regulation need not be judged solely by reference to the demonstration at hand"). Regulations that burden speech incidentally or control the time, place, and manner of expression, see *id.*, at 298-299, and n. 8, must be evaluated in terms of their general effect. Nor are such regulations invalid simply because there is some imaginable alternative that might be burdensome on speech. (emphasis added.) *Id.*, at 299.

The requirement that regulations be narrowly tailored does not require so focused a view of their impact on First Amendment expression that no regard is taken of the ramifications of such a least restrictive view. For example, in *Heffron* v. *International Society for Krishna Consciousness*, *supra*, 452 U.S. at 640, this Court weighed the impact of a rule of the Minnesota Agricultural Society (which operates an annual state fair) that limited all persons or groups desiring to sell, exhibit or distribute materials during the fair, to do so only from fixed locations. This Court found that the State's interest in confining distributions, selling and fund solicitation activities to fixed locations in order to satisfy the State's interest in crowd control satisfied the requirement that a place or

manner restriction serve a substantial state interest. *Id.*, at pp. 653-654.

Directing its attention to the Minnesota Supreme Court's holding that the State could avoid the threat to the interest posed by "less restrictive means, such as penalizing disorder or disruption, limiting the number of solicitors, or putting more narrowly drawn restrictions on the location and movement of [Krisha] representatives," this Court held that "it is quite improbable that the alternative means suggested by the Minnesota Supreme Court would deal adequately with the problems posed by the much larger number of distributors and solicitors that would be present on the fairgrounds if the judgment below were affirmed." *Id.*, at p. 654. In other words, this Court recognized that the constitutional propriety of content-neutral regulations should not be determined in a vacuum. Rather, the court reviewing the regulation must consider the context and the problems of the local agency confronted when it fashioned its rules. "[T]he City must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems." *Young* v. *American Mini Theatres, Inc., supra,* 427 U.S. at 71.

(7)

The wisdom of the Parks Department in determining to provide a tailored sound system to meet the sponsors' individual needs and a professional sound engineer experienced in outdoor events is entitled to substantial deference. *See, Clark* v. *Community for Creative Non-Violence, supra,* 468 U.S. at 299 (judiciary does not have the "authority to replace the Park Service as the manager of the Nation's parks or . . . the competence to judge how much protection of park lands is wise and how that level of conservation is to be attained"); *Young* v. *American Mini Theatres, supra,* 427 U.S. at 71 (it is not the function of the court to appraise the wisdom of an administrative body's conclusion that its "restriction will have the desired effect"). As previously demonstrated, the Use Guidelines are reasonable and were narrowly

drawn to respond to the significant governmental interests involved.

By requiring sponsors to use a state-of-the-art sound system tailored to their individual needs and a designated professional sound technician, the incidental restriction on sound amplification, if any, is no greater than is essential to the furtherance of those interests, which would be achieved less effectively absent the regulation. *United States* v. *Albertini, supra,* 472 U.S. at 689; *Clark* v. *Community for Creative Non-Violence, supra,* 468 U.S. at 296-298; *United States* v. *O'Brien,* 391 U.S. 367, 377 (1968). In providing a tailored sound system manned by professional sound technicians for the specific outdoor demands of the Bandshell, the Parks Department has narrowly tailored the Use Guidelines to address the excessive sound levels and poor sound amplification problems of prior years (JA29, 30, 127, 193-195, 334-335). The Use Guidelines are "not invalid simply because there is some imaginable alternative that might be less burdensome on speech." *United States* v. *Albertini, supra* 472 U.S. at 689.[9]

(8)

The Second Circuit's view is mired in its pointed avoidance of the multifaceted nature of the sound problem facing the City. To begin with, the volume controls and mixing controls were on one board. Challenged by sponsors such as RAR who were immune to instructions from authorities to reduce volume, the Parks Department had no choice but to place the board in the hands of

[9] In analogous Fourth Amendment analysis, this Court has noted that "[t]he reasonableness of any particular governmental activity does not necessarily or invariably turn on the existence of alternative 'less intrusive' means." *Illinois* v. *Lafayette,* 462 U.S. 640, 647 (1983). "A creative judge engaged in *post hoc* evaluation of police conduct can almost always imagine some alternative means by which the objectives of the police might have been accomplished." *United States* v. *Sharpe,* 470 U.S. 675, 686-687 (1985). Therefore, "[t]he logic of such elaborate less-restrictive- alternative arguments could raise insuperable barriers to the exercise of virtually all search-and-seizure powers." *United States* v. *Martinez-Fuerte,* 428 U.S. 543, 556-557 n. 12 (1976).

one engineer to avoid further disputes that might arise over control of the board. Placing one engineer in charge of the board conformed to the reality that mix and volume are interrelated and to the fact that adjustments to both must be made throughout an event (JA100-102, 120-122). The City was confronted with sponsors, such as RAR, whose concern for the enjoyment of other park users is summed up in the standard of loudness announced by the organization's sound engineer:

> I think a volume that would cause people's ears to bleed would be too loud (JA118).

In addition, the City had groups using the Bandshell who were unable to "mix" sound very well, and would resort to loudness to compensate for their lack of mixing skill (JA219). With these two problems in mind, the City devised the Use Guidelines, which unlike so many other content-neutral regulations, not only did not infringe on expression, but actually assisted the communication of those groups who without the requisite mixing skills of out-of-doors production or state-of-the-art sound equipment (JA152,185,224) could not provide top quality sound at the Bandshell. As noted above, in 1986 New York Sound was responsible for 50-60 amplified events. No group expressed dissatisfaction or complained that the quality of the sound was inadequate (JA226-227). It is ironic that RAR, through this case, is the only group to object to this system in view of the fact that they have never used the City's hired sound technician and sound system nor have they ever witnessed its use. *See, Members of The City Council of Los Angeles* v. *Taxpayers for Vincent, supra*, 466 U.S. at 810 (the regulation "responds precisely to the substantive problem which legitimately concerns the City. The ordinance curtails no more speech than is necessary to accomplish its purpose.")

(9)

Although we do not believe that the least restrictive test set forth by the Court of Appeals is the standard pursuant to which the regulations in issue should be reviewed, it is submitted that

the regulations satisfy this stricter standard. There is no other feasible alternative to the employment of a City-hired professional sound technician and sound system. In devising the Guidelines, Joseph Killian considered alternative solutions to the sound problem. He considered negotiating with each individual group to establish a decibel level (JA219-220). This solution Killian rejected because differences in temperature, foliage and audience size made picking one decibel level very difficult (JA220, 285-286). He weighed allowing the public user to bring his own sound system while requiring use of a Parks Department sound technician. This alternative was rejected by Killian because technicians prefer to work with their own equipment (JA220) and lack of familiarity with the equipment would interfere with their ability to provide the sound quality sought by the sponsor. Only the third option, of "getting an independent vendor to provide sound, someone with extensive experience in all phases of music and dance and theatre to provide sound," (JA220) would be effective in dealing with Bandshell sound problems.

In this context, it is worth noting that in prior years, RAR had consistently violated agreed-upon sound levels in the face of repeated requests by the police to reduce the sound (JA129-131, 345-346). At least one request to turn down the sound resulted in RAR members provoking the crowd against the police (JA346-347). Summonses for excessive noise have also been issued to no avail (JA343). And, at least twice, the plug on RAR had to be pulled in order to stop their event from continuing beyond the time allotted on their permit (JA140-141). Moreover, RAR has never offered a reasonable alternative solution to the City's noise problems at the Bandshell. Instead, ignoring its history of belligerence, RAR's only suggestion to the Circuit Court was "that the City could simply ask concert producers to turn their sound down" or "prosecute offenders under the noise regulation law." App.'s Circuit Br., p. 17. In this light, the propriety of the Parks Department's solution is compelling.

In the absence of any record or reasonable suggestion by RAR, the Court of Appeals on its own suggested that the City exercise control only over the volume. However, the volume and mix are on the same instrument panel and are regulated simultaneously. The City's decision to have one professional sound technician operate the entire board is a reasonable one. The Court of Appeals acknowledged that its suggestion might not be feasible by noting that "[a]s a last resort. . . the plug can be pulled on the sound to enforce the volume limit" (A21n.6). It does not have to be emphasized that the removal of a plug during a concert attended by a large crowd is not a practical solution.

In contrast to the Second Circuit's speculative suggestions, the City's solution has been implemented, evaluated and has been deemed satisfactory, without any participating sponsor voicing a complaint. Under the circumstances, the Parks Department's solution to its volume problem is the least intrusive alternative.

In *Clark*, *Albertini* and *Regan*, this Court set forth a balancing test that places appropriate reliance on the wisdom of the local regulatory body faced with their own particular problems. The balancing test allows local regulatory bodies to formulate solutions within legal parameters that are practical rather than theoretical. Accordingly, it is for the courts to determine "whether an agency's decision is within the zone of constitutionality, not in choosing between options within that zone." *White House Vigil* v. *Clark*, *supra*, 746 F.2d at 1531. To endorse the Second Circuit's test is to sanction judicial rule making and "assign to the judiciary the authority to replace the Park Service as manager of [City's] parks" (*Clark* v. *Community for Creative Non-Violence*, *supra*, 468 U.S. at 299), a position never endorsed by this Court.

CONCLUSION

The Judgment Of The Court Of Appeals For The Second Circuit Should Be Reversed, With Costs. The Judgment Of The District Court Which Declared The Use Guidelines Constitutional Insofar As They Required Permittees To Use Only The Department Of Parks And Recreation's Sound Engineer And Sound System Should Be Reinstated.

New York, New York
November 28, 1988

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QUESTION PRESENTED

Whether the Court of Appeals correctly concluded that a New York City park regulation mandating the use of a city designated sound system and sound engineer violated the First and Fourteenth Amendments because the city failed to show that these requirements were "justified without reference to the content of regulated speech, that they are narrowly tailored to serve a substantial governmental interest and that they leave open ample alternative channels for communication." *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984).

PARTIES BELOW

The parties in this case are as follows:

A. Respondent

1. Rock Against Racism.

B. Petitioners

1. Benjamin R. Ward, in his official capacity as Police Commissioner of the City of New York;
2. George Scarpelli, in his official capacity as Chief of Operations for the Department of Parks of the City of New York;
3. Sheldon Horowitz, in his official capacity as Special Events Director of the said Department of Parks;
4. Robert Russo, in his official capacity as Assistant Commissioner for City-Wide Services for the said Department of Parks;
5. Joseph Killian, in his official capacity as Program Director for the Mall Bandshell of the Bethesda Terrace area of Central Park in New York City, said Department of Parks;
6. Edward I. Koch, in his official capacity as Mayor of the City of New York; and
7. The City of New York.

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Schneider v. State, 308 U.S. 147 (1939).....23, 28

Saia v. New York, 334 U.S. 558 (1948)..... 16

Secretary of State v. Joseph H. Manson, 467 U.S. 947, 104 S.Ct. 2839 (1984) 27

Shad v. Borough of Mount Emphraim, 452 U.S. 61 (1981).....14, 26, 27

Shelton v. Tucker, 364 U.S. 479 (1960)..... 27

Shuttleworth v. Birmingham, 394 U.S. 147 (1969) 15

Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975).....14, 16, 23

Speiser v. Randall, 354 U.S. 513 (1958)..... 13

Terminello v. Chicago, 337 U.S. 1 (1949)..... 21

Thomas v. Collins, 323 U.S. 516 (1945) 15

Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969) 21

United States v. Albertini, 472 U.S. 675 (1985) 23, 25, 26, 28

United States v. Grace, 461 U.S. 171 (1983).....24, 26

United States v. One Book Called "Ulysses", 5 F. Supp. 182 (S.D.N.Y. 1933), *aff'd* 72 F. 2d 705 (2d Cir. 1934) 15

Village of Schaumberg v. Citizens for a Better Environment, 444 U.S. 620 (1980) 27

Virginia Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 475 U.S. 748 (1976)..... 25

Widmar v. Vincent, 454 U.S. 263 (1981)..... 26

PAGE

Constitutional Provisions:

United States Constitution, Amendment 1 ..... *passim*

Other Authorities:

C. Baker, "Unreasonable Reasonableness: Mandatory Parade Permits and Time, Place and Manner Regulations," 78 Nw. L. Rev. 937 (1983) 16

R. Buskin, "Engineering: Chinese Instruments, Ashtrays, and Elevator Shafts Share Space In Clive Martin's Recording Repertoire," 9 *Music & Sound Output* 26 (Dec. 1988) 14

T. Emerson, *The System of Freedom of Expression* (1976) 28

M. Herman, "Sound on Stage: Sound Reinforcement News," 13 *Mix*, 118 (Jan. 1989) 15

J. Hirschhorn, "The Separate Community: Military Uniqueness and Servicemen's Constitutional Rights, 62 N.C. L. Rev. 177 (1984) 25

K. Karst, "Equality As A Central Principle In the First Amendment," 43 U.Chi. L. Rev. 20 (1975) 16

H. Kelvin, "The Concept of the Public Forum: Cox v. Louisiana," 1965 Sup. Ct. Rev. 1 24

E. Neisser, "Charging for Free Speech: User Fees and Insurance in the Marketplace of Ideas," 74 Geo. L. Rev. 257 (1985) 16, 24, 28

M. Nimmer, *Freedom of Speech* (1984) 24

Note, "Less Drastic Means and The First Amendment," 78 Yale L. J. 464 (1969) 27

PAGE

D. Scheirman, "Soundmixing: Is It Live, or Is It A Compact Disc: Mixing Flim & the BB's," 9 *Music & Sound Output*, 28, 29-30 (Jan. 1989) 15

G. Stone, "Content Neutral Restrictions," 54 U. Chi. L. Rev. 46 (1987) 16

G. Stone, "Content Regulations and the First Amentment," 25 Wm. & Mary L. Rev. 189 (1983) 16

G. Stone, "Fora Americana: Speech in Public Spaces," 1974 Sup. Ct. Rev. 233 24

L. Tribe, *American Constitutional Law* (2nd Edition 1988) 24

L. Tribe, *American Constitutional Law* (1st Ed. 1978) . 27

G. Whelchel, "MIDI Live," 3 *Music Technology*, 17 (Dec. 1988) 15

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-226

BENJAMIN WARD, et al.,

Petitioners,

—against—

ROCK AGAINST RACISM,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT

STATEMENT OF THE CASE

Respondent Rock Against Racism (hereinafter referred to as "RAR") is an unincorporated association "dedicated to the espousal and promotion of anti-racist views." Ct. Ap. Op. 3.[1]

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1 The following abbreviations will be used in this brief: "JA _____" for citation to the Joint Appendix, "Ct. App. Op. _____" for citation to the opinion of the United States Court of Appeals for the Second Circuit (located in the Appendix to the Petition for a Writ of Certiorari); "Dist. Ct. Op. I _____" for citation to the opinion of the United States District Court for the Southern District of New York, dated April 6, 1987 (which is located in the Appendix to the Petition); "Dist. Ct. Op. II _____" for citation to the opinion of the United States District Court for the Southern District Court of New York, dated April

Since 1979, RAR has sponsored an annual rally/concert at the Naumberg Bandshell (hereinafter referred to as "the Bandshell") in Central Park in the City of New York, featuring speeches by representatives of groups opposed to racism in the United States, interspersed with musical groups representing various nationalities and cultures.[2]

RAR commenced the instant litigation in April 1985, after its request to use the Bandshell for its 1985 rally/concert was denied. Less than a week later, at the suggestion of the district court, the parties reached a settlement and RAR was issued a permit for use of the Bandshell. Following further proceedings the case was placed on the reserve calendar.

A few weeks prior to RAR's 1986 rally/concert, the New York City Department of Parks issued "Use Guidelines," (hereinafter referred to as "the Guidelines") governing the granting of permits for and the staging of events at the Bandshell. The Guidelines set forth Department of Parks' policies on twelve subjects: (1) Permits; (2) Hours/Dates of use; (3) Attendance; (4) Sound Amplification; (5) Insurance; (6) Vehicles; (7) Concession of Goods; (8) Revenue; (9) Safety; (10) Portable Toilets; (11) Cleanup; and (12) Evaluation. The Sound Amplification Guideline, (hereinafter referred to as "SAG"), the provision at issue herein provides, in relevant part that:

30, 1987 (which is located in the Appendix to the Petition); "T.T." for citations to the trial transcript; "Pet. Br." for citation for the Brief for Petitioners; "U.S. Br." citation to the Brief for the United States as Amicus Curiae Supporting Petitioners.

2 Almost every year since it began sponsoring an annual rally/concert at the Bandshell, RAR has experienced difficulty in either obtaining a permit for the Bandshell in completing the events without interference from Park officials and/or the police. In 1983, for example, during the performance of a band, one of whose names expressed antipathy towards police, several police officers approached RAR's sound technician, Alan Thompson, surrounded him and asked which knob controlled the master volume. After Mr. Thompson identified the appropriate knob, one of the officers turned the knob down in a jarring fashion. JA 105. In 1985, two police officers were overheard by Mr. Thompson ridiculing a Native American folk singer. JA 106.

> DEPARTMENT OF PARKS AND RECREATION IS TO BE THE SOLE AND ONLY PROVIDER OF SOUND AMPLIFICATION INCLUDING THOUGH NOT LIMITED TO AMPLIFIERS, SPEAKERS, MONITORS, MICROPHONES, AND PROCESSORS
>
> Department of parks and recreation will employ a professional sound technician [who] will be fully versed in sound bounce patterns, daily air currents, and sounds skipping within the park.

JA 375.

The relevant proceedings and decisions below were as follows:

1. The District Court's Decision of May 1, 1986

On April 23, 1986, RAR filed an application for an order to show cause why the Guidelines should not be held to be violative of the First and Fourteenth Amendments. The district court, on the basis of opposing affidavits submitted by the parties and "such testimony as time pressure allowed," upheld the Guidelines' requirements of a licensing fee, clean-up bond, and liability insurance, but concluded that the provisions requiring that the department be "the sole and only provider of sound amplification" and the city's attempt to limit RAR's time at the Bandshell were unlawful. JA 78. In preliminarily enjoining enforcement of the Sound Amplification Guideline, the court stated:

> This guideline would require RAR to abandon its own system, which it used without complaint by the City last year, and use different equipment whose knobs and dials would be twisted by the hands of strangers—in point of fact, private contractors hired by the City but paid for by RAR. It is recognized that "live musical expression is protected by the First Amendment." *Cinevision Corp. v. City of Burbank*, 745 F.2d 560, 569 (9th Cir. 1984). I agree with RAR that, absent a significant governmental interest requiring a different result, that protection extends not only to the

> words and songs presented but also the sound with actually emanates from the application system. That sound may be substantially affected by the amplification itself and who controls it. To paraphrase the old song; "The music goes round and round, but it comes out *here*."

JA 79-80.

The court also found that the defendants had "failed to demonstrate a constitutionally sufficient basis for the cutting off of the RAR event at 6:00 p.m. because "the guidelines permit 'evening performances to' run until 9:30 p.m." JA 83.[3]

2. The District Court's Decisions of April 16 and April 30, 1987

On November 5, 1986, RAR filed an Amended Complaint seeking a declaration that the Guidelines were unconstitutional and requesting compensatory and punitive damages. The defendants filed an answer, and, discovery proceeded. The trial commenced on March 23, 1987, and ended on April 1, 1987. Twelve witnesses testified at trial.

The first two, Dean Tuckerman and Christy Robb, testified to the difficult history of RAR and the Parks Department. Tuckerman testified that RAR had been refused other locations in Central Park in 1980 such as the Great Lawn, because the Parks Department of the City of New York stated that no "rock" music was allowed there, and offered the Bandshell. T.T. 9-10.

The second witness to testify for RAR was Christy Robb. Ms. Robb testified to the extensive meetings RAR was required to have with the Parks Department and other city agencies, in order to obtain the necessary permits. T.T. 21-22. In 1983, Ms. Robb testified the Park's Department wanted to know the content of the show because it was scheduled to take place on

3 The City's appeal of the District Court's May 1, 1986 decision was dismissed as moot by the Court of Appeals because RAR's rally/concert had already occurred.

Mother's Day. The necessary permits for the 1983 concert were obtained two days before the event. T.T. 22-23.

Additionally, Ms. Robb testified that in 1983 the police surrounded the mixing board and constantly complained to the sound mixer about the volume of the show, although no meters were utilized to determine the decibel level. T.T. 25. At the same concert the police manipulated the dials and controls of the sound mixing board and "pulled the plug" before RAR's permit expired. T.T. 25-26. Ms. Robb stated that when RAR hooked up its own electrical generator, the police physically attacked the generator to stop the flow of power to the musicians. T.T. 26.

Ms. Robb further testified that in 1985 RAR had actually been refused a special events permit for allegedly violating a decibel level requirement during the previous year's event. T.T. 30. After lengthy delays and meetings, RAR was finally able to obtain the necessary permits. T.T. 32-35.

Ms. Robb also testified as to the 1986 RAR rally/concert. According to Ms. Robb, although RAR had put in their application for the event immediately after the 1985 rally, it never heard from the Park's Department. Ms. Robb contacted the Parks Department in January 1986. T.T. 40-41. Ms. Robb was told that that the choice of performers was to be left to the discretion of Mr. Killian, the newly appointed program director for the Naumburg Bandshell T.T. 43-44. After Ms. Robb received the Use Guidelines for the Bandshell, she concluded that they were more stringent then those previously enforced, and it was for that reason RAR went back into court to enjoin the Use Guidelines. T.T. 45-47.

The parties reached a temporary resolution, and RAR went forward with its event. T.T. 49. The many problems with the City, however, effected RAR's ability to attract performers because many of the them were hesitant to play for a group enmeshed in so many problems. T.T. 51-52. In 1986, RAR was not required to use the city's sound system.

Extensive testimony was also given by Alan Thompson, RAR's "mixer". Thompson testified that he had worked with RAR since 1980, and had engineered over 200 concerts for RAR, including the 1985 and 1986 rally/concerts at the Bandshell. T.T. 72-73; 77. Mr. Thompson testified that engineering the sound means setting up all the individual instruments, and then having all of the instruments plugged into the sound, or mixing board. T.T. 72-73. Mr. Thompson continued:

Q. Wait a minute. Lets take it a step at a time here. What is a mixing desk.

A. A mixing desk is a console that combines multiple signals into one signal which is then fed into a sound system.

Q. Can you describe to me what that means in real terms?

A. If a band is set up you can either put one microphone on the entire band or you can put individual microphones on the individual instruments and mix them into one signal and feed it into a sound system.

Q. You're at this board, is that correct?

A. Yes I am at the board, and basically during the performance I am a part of the band, because I am balancing all of their instruments together to sound right to their taste. . . .

* * *

Q. What is echo and reverb?

A. Effects. Like they will want certain effects at certain times and they will give me a list of songs and at each song they will say what type of sound they want for each song, or they will just station one of their own people with me, which is more common.

The Court: At a particular time in a performance can the sound mixer, for example build up one particular instrument and relatively play down others?

A. Exactly. When the guitarist is about to take a lead, for instance, there will be a slight boost just to improve the dynamics, so you can hear the guitar clearly over the rest, yes. Sometimes it is accomplished by turning the rest down so that it doesn't overpower the audience and sometimes it is accomplished by simply boosting one signal.

Q. On the soundboard, if you can approximate how many different individual variations are there for a song?

A. Well, I have somewhere between 200 and 300 separate adjustments that can be made, and during the course of a song my hands will moving all over the board continually, constantly making adjustments. I can't really tell you—estimate how many adjustments I make, but there are quite a few knobs to turn.

T.T. 74-75.

Additionally, Mr. Thompson testified to the sound engineer's role in the overall production of music.

Q. Does the manipulation of the dials require any type of artistic understanding?

A. Absolutely. For instance when you have a concert where there is several different types of music available one has to have a very deep understanding of what a reggae audience or a reggae band would want other than a folk type band. In other words in a reggae type of thing the high hat is supposed to be louder than in any other type of band and the bass guitar is supposed to be very dominant and very boomy and when you go to the next band they want a completely different setup.

T.T. 76-77.

Thompson also stated that there had been incidents with the police since 1981. He stated that in 1984 the police came up to the soundboard and physically turned the volume down.

T.T. 80. As a result, the entire crowd "whirled around", and shouted and complained. T.T. 80. In 1985, the police threatened Thompson that if he did not turn the volume down, they would pull the plug. T.T. 84-85.

In addition, Thompson related that he thoroughly interviews the bands before each performance to determine their needs. T.T. 99. The main basis upon which RAR attracts performers is through the assurance that RAR is in complete control of the set-up and mix. T.T. 102. The performers would not appear otherwise. *Id.* RAR uses a limiter or compressor on its sound system that is designed to automatically limit the sound. T.T. 121.

Defendant Sheldon Horowitz, the Special Events Director of the Department of Parks admitted that he did not receive any complaints in 1985 about the RAR event. T.T. 263.

Gary Floyd, the city's sound expert, stated on cross-examination, that the most important factor in the accurate and aesthetic reproduction of amplified music is the individual working the sound board or mixing board. T.T. 386. Mr. Floyd testified that this person is in charge of the aesthetics of the entire sound. T.T. 398-309. He also stated that the more time a mixer, or soundboard operator, spents with a band the better her/his understanding of the sound of a band. T.T. 390. Additionally, Floyd observed that, although it is not customary, bands can and do ask for particular and unusual sound requirements. T.T. 412-413.

Defendant Joseph Killian testified that the goal of the SAG was to keep the sound within the concert grounds so that it does not bleed into the Sheep Meadow. Killian asserted that it was important to keep the sound from the Bandshell away from the Sheep Meadow because the Sheep Meadow had been decreed a "quiet zone" by New York City Mayor Edward I. Koch. JA 192-194. Killian conceded that it was rare, if ever, that a good show could be produced by a technician unfamiliar with the equipment being used.

According to Killian approximately 45 minutes is needed to have a sound check to satisfy the needs of the all of the bands as far as mixing is concerned. JA 242. This means that at the RAR rally/concert which has approximately six bands, each band has about 7.5 minutes to do a sound-check with New York Sound. (The sound company selected by the City).

Following the trial, the court enjoined enforcement of certain provisions of the Guidelines and sustained two.[4] One of the two

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4 The Guidelines' requirement of a "user fee" for the city-provided sound system "of $100 per performance hour plus a one hour check" was held violative of the First Amendment because "[t]he evidence shows that, under its contract with New York Sound System the city is billed $400.00 for each New York Sound event service at the Bandshell, regardless of duration, and Second Circuit cases prohibited the city from recouping from First Amendment users an amount in excess of the costs actually incurred by the city. A six hour RAR event, when coupled with a one hour sound check would result in a charge of $700.00; almost twice the cost incurred by the city under its contract with the New York Sound." Dist. Ct. Op. II 55.

The court held the liability provision unconstitutional because "it impermissibly vests unfettered discretion in Parks administrators responsible for issuing special event permits" and petitioners have failed to show "that it. . . . [was] narrowly tailored to further legitimate state interests." Dist. Ct. Op. II 58. The Guidelines' provisions setting separate time limits for different performing acts/events was sustained, in part and struck down in part. The court upheld the provision permitting amplified sound at the Bandshell only from 2:00 a.m. to 9:30, but struck down the section according different treatment to performances on the basis of their categorization as performing arts, multiple performance, or festival because the categorizations were vague and undefined and "so shot through with unfettered grants of discretion to city administrators." Dist. Ct. Op. II 71. The provisions of the Guidelines limiting attendance at events at the Bandshell to 3,000 people and barring solicitation of funds and revenue anywhere within Central Park was struck down. The former because the city failed to establish that it was "narrowly tailored to meet the legitimate interest in keeping the park accessible to other park users," the latter because the city failed to identify any legitimate interest underlying this prohibition. . . ." Dist. Ct. Op. II 72, 75.

The proceeding fee and clean-up bond were upheld because, unlike the "user fee" for the sound system, both were costs that could have accrued to the city and RAR had not proven indigence. Additionally,

sections of the Guidelines that was upheld by the district court was the SAG. In upholding the sound amplification provision, the court acknowledged that "RAR has a First Amendment right to the use of a sound amplification system capable of producing the quality of sound it decides, and the level of sound necessary to reach throughout the audience area." Dist. Ct. Op. I 46. However, the court held that "RAR's interest in using its own equipment and sound engineer is . . . 'attenuated' at best. . . ." *Id.* It then went on to conclude that the SAG's requirements were constitutional "because they do not impinge upon a protected right." In dictum, the court observed that "[E]ven if some slight interest in using familiar equipment exists, the guidelines are narrowly tailored to further a legitimate governmental interest." Dist. Ct. Op. 48.[5]

3. The Court of Appeals Decision

The Court of Appeals, in a unanimous decision, reversed the district court holding that the Sound Amplification Guideline was constitutional. Writing for the court, Judge Dorsey first set forth the standard to be applied:

> There is no dispute but that the bandshell, a place traditionally 'used for the purposes of assembly, communicating thoughts between citizens, and discussing public questions,' is a public forum. As such, the city's regulation of the bandshell's use is subject to the first amendment's

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the court upheld that the provision requiring that permits be obtained for vehicles because it was necessary to control entrance and egress from the park and enabled city officials to trace vehicles in the event of claims or violations. Dist. Ct. Op. 57, 58.

5 Both parties thereafter filed motions pursuant to Rule 59(e) of the Federal Rules of Civil Procedure to alter or amend the April 16th order. JA 457-491. The court granted defendants' motion to delate from its April 16th order the paragraph enjoining enforcement of the provision prohibiting solicitation of funds and revenue because RAR had not included this provision in its proposed conclusions of law. Dist. Ct. Op. II 86, 87. RAR's cross motion for an order clarifying whether it had the right to control the sound system "mix" was denied. *Id.* at 87-88.

> limitations on government action which infringes upon the freedom of expression. 'In such places, the government's ability to permissibly restrict expressive conduct is very limited. This protection extends to the production and transmission of musical performances as well as speech.
>
> Under certain circumstances, the city has the right to regulate expressive conduct which has harmful effects on others. Content neutral time, place and manner regulations are permissible so long as they are narrowly tailored to serve a substantial government interest and do not unreasonably limit alternative avenues of expression.

Ct. App. Op. 10-12. (citations omitted). Judge Dorsey added, "However, the method and extent of such regulation must be reasonable, that is it must be the least intrusive upon the freedom of expression as is reasonably necessary to achieve a legitimate purpose of the regulation." *Id.* (citations omitted).

The Court of Appeals found that "The city's express purpose" was "to prevent the noise generated at the bandshell from intruding offensively upon those who choose to attend or hear the musical presentation." Ct. App. Op. 12. It rejected the district court's findings that the city had a second objective in enacting the SAG of ensuring quality of sound at the bandshell:

> [T]he court justified its conclusion that the SAG was valid with reference only to the city's no control objective. No determination was made of the weight to be given the city's interest in quality control, nor was there a finding that this objective could not be effected by other less restrictive means.

Ct. App. Op. 13, n3. Thus, to satisfy its burden, the Court of Appeals, concluded that the city was required to "demonstrate that is regulation of the volume its reasonably accomplished by the required use of the city's system and the city's operator and that the requirements do not unnecessarily intrude on the right of artistic expression." Ct. App. Op. 16. The court concluded that the city had failed to meet its burden because:

> [R]estriction to the use of the city's sound systems is not shown to be necessary to control noise levels. Any system has a volume control. The quality of the system has a limited relation to the regulation of volume. Nor has the technician's operating knowledge been shown to be essential to the regulation of volume. Indeed, another city official monitors the noise level and instructs the technician as necessary to the broadcast volume within the permitted levels.

Ct. App. Op. 17-18.

"[W]ithout ruling on . . . . [their] constitutionality, "the court then discussed alternatives available to the city. Those alternatives included the city's use of a volume limiting device, and negotiating an appropriate decibel level. *Id.* at 18-19.

Thus, the Court of Appeals affirmed the district court's decision to the extent that it sustained the right of the city to limit the volume of performances broadcast from the bandshell to a level otherwise specified. The upholding of the SAG's requirement of the use of city-provided sound system, operated by an engineer supplied by the city, was reversed.

SUMMARY OF ARGUMENT

Petitioners' presentation of their case to this Court is remarkable for its obfuscations. This case is not about the regulation of "noise," but rather petitioners' attempt to control "artistic expression." As a result of petitioners' Sound Amplication Guideline, musicians and concert promoters who hold concerts at the Central Park Bandshell are confined to the use of a city supplied sound system and a city-designated engineer. Local authorities should no more be permitted to tell musicians or concert promoters what kind of sound system they can use or who can operate it than they should be permitted to instruct painters what colors to use or authors what words to write.

Additionally, Petitioners' Brief barely acknowledges that the Bandshell is a "quintessential public forum." Nor do petitioners' recognize that "[c]oncerts . . . have been an integral part"

of the activities at the Bandshell "since the original bandshell was built in 1862." JA 372. By virtually ignoring these matters, petitioners have beclouded what this case is about.

In Part I of this brief, respondent will demonstrate that the Court of Appeals decision should be affirmed because the SAG impermissibly infringes on freedom of expression and because petitioners failed to establish that the SAG was "justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a substantial governmental interest, and that they leave open ample alternative channels for communication." *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984). In Part II, respondent will show that the Court of Appeals decision is consistent with the prior applicable decisions of this Court.

ARGUMENT

I.

THE COURT OF APPEALS CORRECTLY CONCLUDED THAT THE SAG VIOLATED THE FIRST AMENDMENT BECAUSE IT IMPERMISSIBLY INFRINGES ON RESPONDENT'S RIGHT TO FREEDOM OF EXPRESSION, IS NOT NARROWLY TAILORED TO SERVE A SUBSTANTIAL GOVERNMENTAL INTEREST AND DOES NOT LEAVE OPEN AMPLE ALTERNATIVE AVENUES OF COMMUNICATION

Ignoring the issues involved herein,[6] Petitioners persistently characterize their regulations as controls on sound or noise.

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6 In *Speiser v. Randall*, 357 U.S. 513 (1958), this Court recognized that in dealing with First Amendment regulations courts must closely examine both the "operation and effect" of such regulations:

> When we deal with the complex strands in the web of freedoms which make up the free speech, the operation and effect of the method by which speech is sought to be restrained must be subjected to close analysis and critical judgment in the light of the particular circumstances to which it is applied.

Id. at 520.

However, as the Court of Appeals correctly recognized, the SAG's effects extend far beyond either of these:

> Under the SAG *all* sponsors of events at the bandshell must use a sound system and sound engineer supplied by the city, and no other. The city contracts a private firm which supplies a sound system and technician approved by the city for each event. *Thus, the volume, the sound 'mix' and the overall sound quality are all under the physical control of the city supplied technician who answers to officials of the Department of Parks. During the musical program, this sound engineer presides at a 'mixing board' which controls inputs (sound levels, bass, treble, etc.) from each instrument, performer or microphone. By varying the sound mix, the sound engineer can control what the audience hears over the speaker system, including both the volume and artistic result or sound quality.*

Ct. App. Op. 5. (emphasis supplied).[7]

Protection of musicians' and concert promoters' right to "artistic expression" would be meaningless if it did not include the right to use their own sound system and sound engineer because of the crucial role of "mixing" in musical productions.[8] *See e.g.* R. Buskin, "Engineering: Chinese Instruments,

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7 In essence, the SAG is analogous to (a) requiring the publisher of a newspaper to have a governmental agent control its presses to stop undesirable material from being printed or (b) mandating the owner of a radio station to have a state operator reduce or eliminate its signal for the same reason.

8 This Court has held that the First Amendment protects musicians, as well as other artists, right to freedom of expression:

> Entertainment, as well as political and ideological speech, is protected; motion pictures, programs broadcast by radio and television, and live entertainment, such as musical and dramatic works, fall within the First Amendment guarantee.

Shad v. Borough of Mount Ephraim, 452 U.S. 61, 65 (1981). *See also, Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952); *Fact Concerts Inc. v. City of Newport*, 626 F. 2d 1060 (1st Cir. 1980), *rev'd on other grounds*, 453 U.S. 247 (1981) petitioners have not claimed, nor can they claim, that the music sought to be performed by Respondent's is without artistic value. *Miller v. California*, 413 U.S. 15, 22 (1973). Nor can petitioners argue that the music respondent seeks to reform is physically, emotionally or otherwise harmful to those whose hear it. *See, Cox v. Louisiana*, 379 U.S. 536 (1965) (civil rights protesters cheering, clapping and singing did not constitute a breach of the peace).

Ashtrays and Elevator Shafts Share Space In Clive Martin's Recording Repertoire," 9 *Music & Sound Output* 26 (Dec. 1988); Mr Herman, "Sound on Stage: Sound Reinforcement New," 13 *Mix* 118 (Jan. 1989); D. Sheirman, "Soundmixing: Is It Live, or Is It A Compact Disc: Mixing Flim & The BB's," 9 *Music and Sound Output* 28, 29-30 (Jan. 1989); G. Whelchel, "MIDI Live," 3 *Music Technology* 17 (Dec. 1988). Requiring musicians to use only a city-supplied sound system operated by a city-designated engineer is tantamount to telling a writer what words to use and a painter what colors to put on canvases. Cf. *United States v. One Book Called "Ulysses"*, 5 F.Supp. 182 (S.D.N.Y. 1933), *aff'd*, 72 F. 2d 705 (2nd Cir. 1934).

A. The SAG Impermissibly Infringes on Respondents' Right to Freedom of Expression

There is a fundamental and frightening difference between allowing the state to regulate the time, place and manner of expression and sanctioning regulations which permit, indeed mandate, the state's participation in the expression itself. The First Amendment is designed to ensure diversity and freedom of expression; its "very purpose" is to "foreclose public authority from assuming a guardianship of the public mind through regulating the press, speech and religion." *Thomas v. Collins*, 323 U.S. 516, 545 (1945).

The SAG impermissibly infringes on musicians and concert promoters' right to freedom of expression in two crucial respects. First, the SAG vests unfettered discretion over the right to freedom of expression in the hands of city officials. *City of Lakewood v. Plain Dealer Publishing Co.*, ____ U.S. ____, 108 S. Ct. 2138, 2150-2152 (1988); *Shuttlesworth v. Bir-*

mingham, 394 U.S. 147 (1969); *Saia v. New York*, 334 U.S. 558 (1948). Second, as a result of the SAG, musicians and other users of the Bandshell whose music can only be performed successfully by a sound engineer familiar with his work and on a particular sound systems, are subjected to harshly different treatment than other users of the Bandshell. *Southeastern Promotions, Ltd. v. Conrad, supra*, 420 U.S. at 557 ("Each medium of expression . . . must be assessed for First Amendment purposes by standards suited to it, for each may present its own problems.") *And see, Anderson v. Celebrezze*, 460 U.S. 780, 793 (1983); *Brown v. Socialist Workers '74 Campaign Committee*, 459 U.S. 87, 93 (1982).[9]

1. The SAG Gives City Officials Unfettered Discretion Over Freedom of Expression

The SAG places unfettered control over musicians and concert promoters right to freedom of expression because, as the Court of Appeals, recognized:

> In the highly subjective realm of music, legitimate regulation of noise levels does not justify standardization. The required use of the city's system and technician forces each performer and sponsor to filter its sound quality, tone, mix and other aesthetic factors through the city's technician and sound system.

Ct. Ap. Op. 21.

The SAG allows the city to select any equipment it desires and any technician who is "fully versed in sound bounce patterns, daily air currents, and sound skipping within the Park." The sound technician's performance is governed only to the

9 *See generally*, C.E. Baker, "Unreasoned Reasonableness: Mandatory Parade Permits and Time, Place and Manner Regulations," 78 Nw. V.L. Rev. 937, 969 (1983); K. Karst, "Equality as a Central Principle in the First Amendment," 43 U. Chi. L. Rev. 20, 36 (1975); E. Neisser, "Charging for Free Speech: User Fees and Insurance in the Marketplace of Ideas," 74 Geo. L. Rev. 257, 297 (1985); G. Stone, "Content Neutral Restrictions," 54 U. Chi. L. Rev. 46, 81-86 (1987); G. Stone, "Content Regulations and the First Amendment," 25 Wm. & Mary L. Rev. 189, 218 (1983).

extent that he or she "must also consider the Bandshell's proximity to the Sheep Meadow, the activities at Bethesda Fountain. . . ." The SAG does not further define "consider." JA 375-376.

The standards which the SAG does express are remarkable for their lack of reference to the interests of Bandshell performers. The only limits imposed on the sound equipment and sound mixers are requirements which further the city's purported interest in controlling noise in Central Park. The SAG does not even acknowledge the interests of performers and/or their audience in the quality of the music produced. Under the SAG, the City of New York is free to select sound equipment and engineers wholly lacking in the ability to convey music in a manner pleasing to either performers or their audience. *Id.*

The city, of course, vehemently asserts that New York Sound does provide "top quality" sound and that the city supplied engineer "does all he can to accommodate the sponsor's desires" on artistic issues. Pet. Br. at 15, 42. The Solicitor General goes so far as to claim that performers "enjoy complete autonomy with respect to all issues of sound mix." U.S. Brief at 11. This line of argument only underscores the unconstitutional discretion which the SAG gives to the city. Even if it were possible for one set of sound equipment and one engineer to satisfy the taste of all performers[10] there is nothing in the SAG which requires autonomy on sound mix or which gives performers any recourse if they conclude that New York Sound is not supplying their musical requirements.

Although the SAG itself provides no guarantees of musical quality or remedies for dissatisfied performers or listeners, the city's defense of the SAG rests on the unstated assumption that the city is dedicated to providing the best possible sound engineer and sound equipment. Even if "best" in an artistic context could be objectively determined, the city's argument would run

10 The proposition that a single sound system and sound mixer can please all audiences and performers is no more likely than the assertion that a single orchestra—even the New York Philharmonic—will satisfy all classical music enthusiasts.

afoul of the Constitution. In *City of Lakewood v. Plain Dealer*, 108 S.Ct. 2138 (1988), the city asserted that permits for news racks would be denied only "for reasons related to the health, safety, or welfare of Lakewood citizens. . ." This Court rejected this illusory promise. "This presumes the Mayor will act in good faith and adhere to standards absent from the statute's face. But this is the very presumption that the doctrine forbidding unbridled discretion allows." 108 S.Ct. at 2150.

The SAG gives the city too much discretion even when it comes to regulating sound volume. Although the SAG requires the mixer to "consider" activities at the Sheep Meadow and Bethesda Fountain, it does not elucidate the meaning of the term. Thus, a sound engineer might "consider" that sound bleed from songs expressing a controversial message might intrude or annoy sunbathers more than other varieties of music. Raising or lowering sound volume based on the message of the music would certainly be unconstitutional, yet the SAG permits the city sound engineer to do just that. *See, Niemotko v. Maryland*, 340 U.S. 268, 282 (1951) (Frankfurther, J. concurring) (speech may not be suppressed "merely because public officials disapprove, the speaker's views").

2. The SAG Is Not "Content Neutral" Because It Is Dependent On Subjective Aesthetic Criteria

Petitioners' advances two internally contradictory propositions to support their claim that requiring all performers to use New York Sound's equipment and engineers is constitutional. On the one hand, the city adamantly maintains that the use of state sound equipment and a state sound engineer is content-neutral. At the same time, however, the city lauds the particular excellence of its equipment and expertise of its engineers. Much of the city's brief is devoted to various self-congratulatory notes on the care with which it selected New York Sound from no less than sixteen different aspirants; the "state of the art" equipment New York Sound employs; the "extensive" out door experience of New York Sound's employees;" and the "remarkable sensitivity" displayed by the company in terms of "aesthetic balancing." In short, the city argues that its sound

regulations are "content neutral" while at the same time insisting that the content produced by New York Sound is particularly good. The sound regulations are content-neutral, according to the city, because the state-produced sound is of superior quality.[11]

The city's argument proves too much. The First Amendment does not permit and cannot tolerate state control of artistic expression merely because the state claims that is efforts will lead to "top-quality" results. *Police Department of Chicago v. Mosley*, 408 U.S. 92, 95 (1972) ("[T]he First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.") Sound equipment and sound mixing are inherently subjective phenomena.[12] To impose one system and one engineer on all musical performers at the Central Park Bandshell is no more constitutional than requiring all violinists to use a city violin, even if the city violin was a Stradivarius. There will always be some violinists who would rather use their own. Similarly, some bands will always prefer Alan Thompson to New York Sound.

Additionally, the petitioners make much of the fact that prior to the regulations, "some groups did not provide the amplifications levels required and 'crowds unhappy with the poor sound became disappointed or unruly." Pet. Br. at 9. By contrast, the city asserts that since there has been a city sound system and sound mixer, all of the users have been satisfied. Here, again, the city makes plain that the asserted constitutionality of its

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11 "With these two problems in mind, the City advised the Use Guidelines, which unlike so many other content-neutral regulations, not only did not infringe on expression, but actually assisted the communication of those groups who without the requisite mixing skills of out-of-doors production or state-of-the-art sound equipment could not provide top quality sound at the Bandshell." (Pet. Br. at 42.)

12 *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485 (1984) is a good example of the heated controversies and ultimately unresolvable questions that can arise when different persons evaluate a sound system.

regulations are rooted in the quality of the system and engineer the city has chosen to provide.

The notion that state controlled sound equals constitutional sound raises unanswerable questions. Would the city's regulations become invalid if one group complained about New York Sound system? If more than one group complained? What would be the constitutional implications if the music critic for *The New York Times* found the system inadequate? What if the critic was only from the *New York Post*? What if members of the audience become "disappointed and unruly" after listening to New York Sound? What if the city decides it can no longer afford New York Sound and hires one of the companies it previously rejected? What if the engineer for New York Sound becomes ill and his replacement is less talented or experienced? What if new "state-of-the-art" equipment is developed and New York Sound chooses not to buy it? What if Rock Against Racism prefers Alan Thompson and his equipment?

These questions point up the difficulty of grounding regulations in the asserted excellence of government sponsored expression. The Constitution cannot support a scheme where regulations are valid if the city sound system is deemed "good" and unconstitutional if it is adjudged "not so good." "Good" and "not so good" are exactly the types of judgments that must be left to the ears of performers and their audiences—not city officials.

B. Petitioners Failed to Established That the SAG Was Narrowly Tailored To Serve A Substantial Governmental Interest Or That It Leaves Open Ample Alternative Avenues For Freedom of Expression

Even assuming arguendo that this Court concludes that the SAG does not impermissibly infringe on "artistic expression", RAR still should prevail because, as the Court of Appeals correctly concluded that the SAG was not narrowly tailored to serve a substantial governmental interest and that it failed to leave open ample alternative avenues for freedom of expression.

1. The SAG Does Not Serve A Substantial Governmental Interest

Petitioners offer two justifications for the SAG's restrictions on freedom of expression. First, they claim that they are necessary to prevent "excessive noise." Second, they contend that they are justified to ensure quality amplication of musicians who perform at the Bandshell.[13] Neither of these constitute a "substantial governmental interest."

Although this Court has held that the government has a substantial governmental interest in protecting the privacy of individuals in their home, *See e.g.*, *Frisby v. Shultz*, ____ U.S. ____, 108 S. Ct. 2495, 2502 (1988); *Carey v. Brown*, 447 U.S. 455, 471 (1980); *Rowan v. Post Office Dept.*, 397 U.S. 728 (1970), it is clear that no such interest exists outside of the home. *See e.g.*, *Eronzinik v. Jacksonville*, 422 U.S. 205 (invalidating an ordinance prohibiting drive-in movie theatres from exhibiting films containing nudity where the screen is visible from a public screen); *Hess v. Louisiana*, 414 U.S. 105 (1973) (use of the word "fuck" in loud voice on public street does not violate "privacy interests"); *Cohen v. California*, 403 U.S. 15 (1971) (display of message, "Fuck the Draft," in courtroom corridor did not violate "privacy interests"). Likewise, the SAG's restrictive requirements can not be justified because of a few complaints from residents of Central Park West or Fifth Avenue. *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 508 (1969); *Terminello v. Chicago*, 337 U.S. 1 (1949).

Petitioners second justification is equally inadequate because, as this Court has often recognized, "the First Amendment mandates that we presume that speakers, not the government, know best both what they want to say and how to say it."

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13 The Court of Appeals rejected the district court's finding that the SAG was implemented to ensure "quality of sound at the Bandshell because, *inter alia*, "[n]o determination was made of the weight to be given the city's interest in quality control, nor was there a finding that this objective could not be effective by other, less restrictive means." Ct. App. Op. 13, n.

Riley v. National Federation of the Blind of North Carolina, ____ U.S. ____, 108 S. Ct. 2667, 2674 (1988). Cf., *Thomas v. Collins*, 323 U.S. 516, 545 (1945) (Jackson, J. concurring).

2. The SAG Is Not Narrowly Tailored

Furthermore, even assuming *arguendo* that the petitioners' proffered justifications for the SAG constitute a substantial governmental interest, under the circumstances presented, they are not narrowly tailored to serve such an interest. This Court has said that "a statute is narrowly tailored if it targets and eliminates no more than the exact source of the 'evil' it seeks to remedy." *Frisby v. Schultz*, *supra*, 108 S.Ct. at 2502. Petitioners' SAG fails to meet this requirement because it extends far beyond the regulations of noise and impermissibly intercedes on respondent's right to freedom of expression. *Supra* at pp. 16-18. As the Court of Appeals correctly recognized "[a]ny sound system has a volume control." Ct. App. Op. 17.

Moreover, several more reasonable alternatives than those employed by respondents are readily available. Petitioners could enforce existing laws and regulations against "excessive noise" against respondents and others, impose a decibel, limit or use of a sound control device.[14] *See e.g. Jim Crockett Promotion, Inc. v. City of Charlotte*, 706 F.2d 486, 493 (4th Cir. 1983); *Reeves v. McConn*, 631 F.2d 377, 386-387 (5th Cir. 1980); *reh'g denied*, 638 F.2d 767 (1981). *And see*, N.Y.C. Admin. Code, tit. 24, § 24-203.

3. The SAG Does Not Leave Open Ample Alternative Avenues For Freedom of Expression

Finally, by requiring all users of the Bandshell to use only a city-supplied sound system, and a city-designated engineer, petitioners are essentially saying to users of the Bandshell whose "artistic expression" is impermissibly infringed by these requirements to "take it, or leave, it." However, this Court has

14 Ironically, the Solicitor General admits that the United States Parks Department controls sound volume by methods which do not mandate use of a state sound system or sound engineer. U.S. Brief at 21.

long recognized that "one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schneider v. State*, 308 U.S. 147, 163 (1939), *quoted* with approval in *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. at 556. Thus, it is of no moment that RAR could use another site for its rally/concert.

From 1862 to 1986, the Bandshell was used for concerts and performances without any restrictions on sound systems or sound engineers, and petitioner, on the record herein, have not established a constitutionally sufficient justification for their belated intrusion on the freedom of expression by users of the Bandshell.

II.

THE COURT OF APPEALS CORRECTLY APPLIED THE PRIOR DECISIONS OF THIS COURT

Petitioners' principal complaint to this Court is that the Court of Appeals failed to follow this Court's decisions in *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984) and *United States v. Albertini*, 472 U.S. 675 (1985). However, neither *Clark* nor *Albertini*, both of which are easily distinguishable from the case at bar, set forth a new constitutional standard. In fact, the Court of Appeals' decision is, in all respects, consistent with these cases.

A. The Standard of Review

Last term, Justice O'Connor summarized this Court's prior decisions on regulations limiting freedom of speech as follows:

> To ascertain what limits, if any, may be placed on protected speech, we have often focused on the "place" of that speech, considering the nature of the forum the speakers seek to employ. Our cases have recognized that the standards by which limitations on speech must be evaluated "differ depending on the character of the property." Specifically, we have identified three types of fora: "the

> traditional public forum, the public forum created by government designation, and the non-public forum."

Frisby v. Schultz, ____ U.S. ____, 108 S.Ct. 2495, 2499 (1988), *quoting*, respectively, *Perry Education Assn. v. Parry Local Educators Assn.*, 460 U.S. 37, 44 (1983) and *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, 473 U.S. 788, 805 (1985).[15] In "traditional public forums," such as "streets and parks", "the government's ability to permissibly restrict expressive conduct is very limited." *United States v. Grace*, 461 U.S. 171, 177 (1983). *See also*, *Boos v. Barry*, ____ U.S. ____, 108 S. Ct. 1157, 1162 (1988). Regulations governing the use of streets and parks will survive constitutional scrutiny only if

> they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a substantial governmental interest, and that they leave ample alternative channels for communication.

Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984). See also, *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 50 (1986); *Regan v. Time, Inc.*, 468 U.S. 641, 648 (1984).

B. The Court of Appeals Decision Is Consistent With This Court's Prior Decisions

In its decision below, the Court of Appeals, defined the First Amendment's limitations on the power of local regulators as follows:

> Content neutral time, place and manner regulations are permissible so long as they are narrowly tailored to serve a

15 *See generally*, H. Kelvin, "The Concept of the Public Forum: Cox v. Louisiana," 1965 Sup. Ct. Rev. 1; Neisser, "Charging for Free Speech: User Fees and Insurance in the Marketplace of Ideas," 74 Geo. L. J. 257, 283-288 (1985) (hereinafter "Neisser"); Nimmer, *Freedom of Speech*, § 4.09 [D][1] (1984) (hereinafter "Nimmer"); Stone, "Fora Americana: Speech in Public Places," 1974 Sup. Ct. L. Rev. 233 (hereinafter "Stone"); Tribe, *American Constitutional Law*, 986-997 (2nd Ed. 1988) (hereinafter "Tribe").

> substantial governmental interest and do not unreasonably limit alternative avenues of expression.

Ct. App. Op. 11-12, *citing*, *Clark v. Community for Creative Non-Violence*, *supra*, 468 U.S. at 295; *City of Renton v. Playtime Theatres*, *supra*, 475 U.S. at 50; *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976). Judge Dorsey, speaking for all the members of the court, by way of clarification, then observed, "[h]owever, the method and extent of such regulation must be reasonable, that is it must be the least intrusive upon the freedom of expression as is necessary to achieve a legitimate purpose of the regulation." *Id.* Seizing on this one sentence and the Court of Appeals consideration of the alternative to those employed in the SAG, Petitioners claim that the decision conflicts with *Clark* and *Albertini*. Nothing could be further from the truth.

First, neither *Clark* nor *Albertini* set forth a new constitutional standard. These cases rest rather on legal principles and/or factual situations inapposite to those herein. In sharp contrast to the instant case, *Albertini* involved access to a military base, government-owned property which, even when it is open to the public, has never been considered a "traditional public forum." *United States v. Albertini*, *supra*, 472 U.S. at 684. *See also*, *Greer v. Spock*, 424 U.S. 828 (1976). *Cafeteria Workers v. McElroy*, 367 U.S. 886, 893 (1961) (Commanding officers of military bases have "historically unquestioned power . . . . [to] summarily exclude civilians from the area of their command."). *See generally*, J. Hirschhorn, "The Separate Community: Military Uniqueness and Servicemen's Rights," 62 N.C.L. Rev. 177 (1984).

In *Clark*, this Court upheld the United States Park's Services prohibition on overnight sleeping in Lafayette Park and the Mall because of the "Government's substantial interest in maintaining [them] in the heart of the our capitol in attractive and intact condition, readily available to the millions of people who wish to see and enjoy them by their presence." *Clark v. Community for Creative Non-Violence*, *supra*, 468 U.S. at

296.[16] Additionally, the Park's Service's regulation did not, as is the case here, significantly impinge on CCNV's right to freedom of expression.[17]

In short, both *Clark* and *Albertini* rest on a determination that the forms of expression sought was incompatible with the historic and normal use of the properties therein. *Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972). ("The crucial question is whether the manner of expression in incompatible with the normal activity of a particular place at a particular time.") *See also*, *United States v. Grace*, 460 U.S. at 186-187 (Marshall, J. concurring); *Widmar V. Vincent*, 454 U.S. 263 (1981); *Shad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981); *Greer v. Spock*, *supra*, 424 U.S. at 843 (Powell, J. concurring); *Brown v. Louisiana*, 383 U.S. 131, 141-142 (1966). *See generally*, Tribe, *American Constitutional Law*, 690-691 (1st Ed. 1978). No such claim can be made here.

Secondly, this Court has repeatedly emphasized the need for precision in regulation effecting the exercise of First Amend-

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16 Central Park can hardly be compared to either Lafayette Park or the Mall. "Lafayette Park is a roughly 7-acre square located across Pennsylvania Avenue from the White House. Although originally part of the White House grounds, President Jefferson set it aside as a park for the use of residents and visitors. It is a "garden park with a . . . formal landscaping of flowers and trees, with fountains, walks and benches. . . The Mall is a stretch of land running westward from the Capitol to the Lincoln Memorial some two miles away. It includes the Washington Monument, a series of reflecting pools, trees, lawns and other greenery. It is bordered by, *inter alia*, the Smithsonian Institution and the National Gallery of Art. Both the Park and the Mall were included in Major Pierre L'Enfant's original plan for the Capital. Both are visited by vast numbers of visitors from around the country, as well as by large numbers of residents of the Washington Metropolitan area." *Clark v. Community for Creative Non-Violence*, 468 U.S. at 290.

17 The impact of the Park Service's prohibition on overnight sleeping on the Community for Creative Non-Violence's right to freedom of expression was minimal because: (1) the Parks Service allowed CCNV to erect two symbolic tent cities and (2) the "major value" of overnight sleeping was "facilitative." *Clark v. Community for Creative Non-Violence*, 468 U.S. at 292, 296.

ment rights. *See e.g.*, *Boos v. Barry*, 108 S.Ct. at 1162; *Secretary of State v. Joseph H. Munson*, 467 U.S. 947, 961 (1984); *Shad v. Borough of Mount Epharim*, *supra*, 452 U.S. at 68-71; *Village of Schaumberg v. Citizens for a Better Environment*, 444 U.S. 620, 637 (1980); *NAACP v. Buttons*, 371 U.S. 415, 438 (1963). Obviously, a regulation is neither precisely drawn nor "narrowly tailored" if less intrusive means than those employed are available. Indeed, just last term, in *Boos v. Barry*, this Court, in voiding a provision banning the display of certain signs within 500 feet of a foreign embassy, stated:

> [T]he display clause is not crafted with sufficient precision to withstand First Amendment scrutiny. It may serve an interest in protecting the dignity of foreign missions, but it is not narrowly tailored; a less restrictive alternative is readily available.

Boos v. Barry, *supra*, 108 S.Ct. at 1168. *See also*, *Federal Communication Commission v. League of Women Voters of California*, 468 U.S. 364, 395 (1984).

Thirdly, this Court, as did the Court of Appeals, has often considered whether less intrusive alternatives to those employed exist. *Riley v. National Federal of the Blind of North Carolina*, ____ U.S. ____, 108 U.S. 2667, 2679 (1988); *Heffron v. International Society for Krishna Consciousness*, 460 U.S. 640, 654 (1981); *Schaumberg v. Citizens for a Better Environment*, *supra*, 444 U.S. 635-639; *Shelton v. Tucker*, 364 U.S. 479 (1960). *And see generally*, Tribe, *supra*, 997-86; Neisser, *supra*, 283; Stone, *supra*, 264-272. Note "Less Drastic Means and the First Amendment," 78 Yale L. J. 464 (1969)

Finally, Petitioners and the Solicitor General strenuously argue that the Court of Appeals decision improperly intrudes on the deference accorded local regulatory bodies. Pet. Br. at 28, 31-32; U.S. Br. at 18-20. Time and time again this Court has rejected such arguments because, although "legislative preferences or beliefs respecting matters of public convenience may well support regulations directed at other personal activities," they are "insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institu-

tions." *Schneider v. State*, 308 U.S. 147, 161 (1939). *Accord*, *Riley v. National Federation of the Blind of North Carolina*, *supra*, 108 S.Ct. at 2676. ("[W]e reaffirm simply and emphatically that the First Amendment does not permit the State to sacrifice speech for efficiency."). *Bose Corp. v. Consumers Union*, *supra*, 466 U.S. at 511 ("Judges, as expositors of the Constitution, must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold.") *And see*, Neisser, *supra*, at 281. ("The first amendment is designed, interpreted and implemented to protect all forms of conmunication from government interference and control.") *See generally*, T. Emerson, *The System of Freedom of Expression* (1976).

Accordingly, this Court should reject Petitioners' argument that the Court of Appeals failed to follow *Clark* and *Albertini*.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

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No. 88-226

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Petitioners,

-against-

ROCK AGAINST RACISM,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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RESPONDENT'S ASSERTIONS THAT THE CITY'S USE GUIDELINES CONTROLLED ARTISTIC EXPRESSION ARE, AS THE DISTRICT COURT HELD AFTER TRIAL, BELIED BY THE RECORD AND DEVOID OF ANY FACTUAL SUPPORT.

(1)

Relying on emotionally charged language ("state controlled sound" [Resp.'s br., p. 20]) and inflammatory accusations (the Use Guidelines are "tantamount to telling a writer what words to use and a painter what colors to put on canvas" [Resp.'s br., p. 15]), respondent contends that the City's Use Guidelines regulat-

ing sound at the Naumburg Bandshell in Central Park impermissibly infringe on its right of freedom of expression. Respondent goes so far as to allege that the case at bar "is not about the regulation of 'noise' but rather petitioner's attempt to control artistic expression." Resp.'s br., p. 13.

Respondent's argument fails for two fundamental reasons. First, the City proved at trial, and the District Court and Circuit Court both held that the Use Guidelines challenged were formulated for the legitimate purpose of preventing noise generated at Bandshell events from intruding offensively upon other park users and nearby residents (A12-13; 43-44).[1] Both courts recognized, in keeping with the prior holdings of this Court, that content-neutral regulations enacted for the purpose of maintaining a modicum of tranquility in an urban environment serve a substantial governmental interest. *Grayned* v. *City of Rockford*, 408 U.S. 104, 116 (1972); *Kovacs* v. *Cooper*, 336 U.S. 77, 87-89 (1949).[2] Second, the City proved at trial and the District Court so held, that as a matter of fact, the Use Guidelines did not adversely affect or infringe upon any Bandshell user's freedom of expression (A41, 89). What makes both of these findings particularly noteworthy in the face of respondent's present assertions is that respondent never used or even observed the use of the City-hired sound system and sound engineer (JA123). In addition, respondent, who so shrilly claims First Amendment deprivation, recognized that the only outer limit on noise at Bandshell events was when the "people's ears . . . bleed" (JA118).

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[1] Numbers in parentheses preceded by the letter "A" refer to pages of the Appendix of the Petition for a Writ of Certiorari. Numbers in parentheses preceded by the letters "JA" refer to pages of the Joint Appendix.

[2] Respondent does not believe regulating excessive noise constitutes a substantial governmental interest although it did not seek this Court's review by cross-petition for a writ of certiorari of the contrary holding of the Second Circuit. Resp.'s br., p. 21. Respondent neither explains why excessive noise should not be subject to regulation nor why *Grayned* or *Kovacs* are not controlling on this point.

(2)

Ignoring the evidence adduced at trial and the fact-finding of the trial court, respondent characterizes the regulations as formulating "state controlled sound." Resp.'s br. p. 20. Respondent goes so far as to characterize the regulations as the City's attempt to "control 'artistic expression.'" Resp.'s br. p. 72. Nothing could be further from the truth.

Both the District Court (A44) and the Court of Appeals for the Second Circuit (A12-14) held that the express purpose of the Use Guidelines was to prevent noise generated at the Bandshell from intruding offensively upon those who did not choose to attend or hear the musical event (A12, 44). The Use Guidelines do not, as suggested by respondent, tell a writer what to write, a speaker what to say, or a musician what to play or with what instrument. *See*, Resp.'s br., pp. 15-19. The regulations do, however, allow the City to place a limit on the loudness of the amplified sound of the speaker or musician.[3]

Respondent and the Second Circuit, however, adhere to the view that to require the user of the Bandshell to use the City-hired sound company, its equipment and its sound engineer is tantamount to standardizing expression. Neit her respondent at trial or in his brief nor the Circuit Court in its opinion provide any evidentiary support to substantiate this view.

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[3] We note that unlike the regulations that this Court will review in *Bd. of Trustees of the State University of New York* v. *Fox*, 841 F.2d 1207 (2d Cir. 1988), *cert. granted*, _U.S._, 57 U.S.L.W. 3200 (October 3, 1988) (No. 87-2013), the Use Guidelines allow any user of the Bandshell to communicate his/her views fully without regard to their content. The regulations at issue in *Fox*, however, provide that "[n]o authorization will be given to private commercial enterprises to operate on State University campuses or in facilities furnished by the University other than to provide food, legal beverages, campus bookstore, vending, linen supply, laundry, dry cleaning, banking, barber and beautician services and cultural events." Brief for Petitioners, Board of Trustees of the State University of New York, p. 2.

The City-hired sound company and sound engineer were bound by the order of the District Court dated April 30, 1987 (A88-89) and the directions of the Program Director, Joseph Killian (JA229-230), to provide any Bandshell user with the quality of mix and reproduction they desired. While the City maintained ultimate control of the mixing board as to volume, the sound engineer had to follow directions of the user's representative as to mix (JA222, 229).

After five days of testimony and after the District Court in its Opinion dated April 6, 1987, sustained the constitutionality of the Use Guidelines and their implementation insofar as they regulated sound (A46-47), respondent moved to amend the judgment to clarify whether the District Court's opinion allowed RAR to "actually control the mixing board and sound system" (JA486). By its Memorandum Opinion, dated April 30, 1987, the District Court interpreted RAR's motion to "suggest" that the City-designated sound engineer "is not able properly to implement a sponsor's instructions as to sound quality or mix" (A89). Significantly, and contrary to the whole underlying premise of respondent's argument that the Use Guidelines infringe on First Amendment expression, the District Court held:

> No evidence to that effect was offered at trial; as noted the evidence is to the contrary (A89).

In other words, when respondent, who initiated this litigation, was given an opportunity to prove at trial that "[p]rotection of musicians' and concert promoters' right to 'artistic expression' would be meaningless if it did not include the right to use their own sound system and sound engineer because of the crucial role of 'mixing' in musical productions" (Resp.'s br., p. 14), it failed to present a single witness to substantiate the claim. The City produced not only witnesses who demonstrated the efforts of Parks Department's officials to formulate guidelines that would both satisfy the City's need to regulate noise at Bandshell events while giving users unfettered expression, but they also presented evi-

dence that convinced a District Court to make a factual finding that the City was able to provide any artist using the Bandshell with the sound quality or mix they desired (A89). Respondent has pointedly avoided the import of this finding which is entitled to special deference. *Bose Corp.* v. *Consumers Union*, 466 U.S. 485, 499-500 (1984); *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 393-395 (1948); Fed. Rules of Civ. Pro. 52(a).

(3)

Having no evidence to substantiate their contentions, respondent mischaracterizes the implementation of the Use Guidelines and claims that "[t]he First Amendment does not permit and cannot tolerate state control of artistic expression merely because the state claims that is [sic] efforts will lead to 'top quality' results" (citation omitted). Resp.'s br., p. 19. Respondent, without reference to any evidence adduced at trial, attempts to persuade this Court that the Parks Department's Use Guidelines allow the City to foist a monolithic sound system monitored by a robot-like engineer onto unwitting artists. The evidence produced by the City at trial showed otherwise.

Gary Floyd, a sound consultant of considerable experience (JA141-144), was hired by Joseph Killian to help choose a sound company that would be used to implement the Use Guidelines. Floyd chose New York Sound after comparing the sound equipment inventory of each bidder and after speaking with contractors who had used each bidder (JA152-153). In this way, Floyd chose New York Sound because he found that it could provide the expertise, the inventory of sound equipment and performance demeanor that could best suit Bandshell users (JA152). Thereafter, Killian did not simply hire New York Sound but examined them on a trial basis for nine events (JA155). Importantly, technical questionnaires were sent to groups months in advance of their Bandshell events in order to elicit their exact sound amplification needs. In this way, a particular performer or group's technical

needs could be addressed by the City-hired sound company (JA61-63, 165-166).

Thus, rather than provide a single "sound system," as suggested by respondent, the Parks Department provided each Bandshell user with a system tailored to the individual's event, needs and desires.[4] With respect to the use of the equipment, the Parks Department established at trial that the hired sound company had the flexibility to give any performer or group or user of the Bandshell an amplification system dedicated to their needs, while allowing ultimate control of the volume to remain with the City (JA40; 41; 46-47, 88-89).

(4)

Respondent in its brief, contends that "as a result of [the Use Guidelines] musicians and other users of the Bandshell whose music can only be performed successfully by a sound engineer familiar with his work and on a particular sound systems (sic), are subjected to harshly different treatment than other users of the Bandshell." Resp.'s br., p. 16. However, at trial, respondent, who was not only unfamiliar with the sound equipment and engineer provided by the City-hired sound company, but, in fact, never even attended any event at the Bandshell during which New York Sound provided sound amplification (JA123), produced not a single witness to substantiate this notion which is central to its claim of First Amendment infringement.

Respondent did have its sound engineer, Alan Thompson, testify. He explained the intricacies of working the mixing panel

[4] In addition, the Parks Department sought to provide groups unfamiliar with producing events outdoors, and who sometimes came with inadequate equipment, with an inventory of equipment and professional know-how that would enhance their performance. Often such groups had resorted to raising volume to compensate for their inadequate equipment and inability to "mix" their sound properly in the out-of-doors (JA218). With the Use Guidelines, the Parks Department sought to contain the bleed of excessive noise of such groups and disappointment of audiences who recognized their inability to provide properly mixed sound (JA30, 219).

(JA100-101). He explained that manipulation of the dials on the mixing panel requires "artistic understanding" (JA102). Thompson was not asked if his function could be performed with equal sensitivity or artistry by another sound engineer, nor did he contend that it could not be.

In contrast, Gary Floyd indicated during his testimony that a good sound engineer could reflect the aesthetic choices of the musician (JA180). Floyd explained that the sound engineer obtains the necessary information concerning the performer's preference at the beginning of the performance. The performers, said Floyd, are very specific about what they like and dislike (JA180).[5] In this way, stated Floyd, an experienced technician can, within a span of "generally five minutes," learn how to provide the desired mix of any band (JA181).

Even if respondent had been able to call a musician to testify that only RAR's sound engineer, Alan Thompson, could produce their music in a satisfactory manner, such testimony would not establish a constitutional violation. If the constitutionality of time, place, and manner regulations were dependent upon a performer's complete satisfaction with them, then any such restraints challenged in litigation as unconstitutional would, by definition, be unconstitutional by the mere fact that a dissatisfied performer brought suit. The vagueness and variability of such a standard would, itself, be unconstitutional. The problems inherent in such a variable standard are exemplified in this case, where respondent's sound engineer testified that only a sound level causing physical injury to one's ears could be characterized as "excessive." Were the City required to draft regulations that satisfied respondent's sound engineer, they would not be able to

[5] Alan Thompson, sound engineer for RAR, described the process in virtually the same terms as Floyd. When asked how he knows what a group's "taste" is, Thompson said: "They have their manager and/or their sound mixer present at my elbow... [o]r they tell me what they want previously and they give me a list of songs, saying they want echo or reverb here or there and they want this and that" (JA101).

draft any meaningful regulations. Clearly, this is not, and cannot be, the appropriate constitutional test.

The District Court accepted Mr. Floyd's testimony and found that the City-hired sound engineer could provide whatever mix any musician or artist has requested (JA88-89). In light of the District Court's finding, respondent's First Amendment interest is reduced to whatever value there is in using its own sound equipment. To find First Amendment infringement on this basis, where the record is devoid of proof that any user's artistic expression was compromised by the City-hired sound engineer, is to trivialize the City's interest in regulating noise—a regulation that this Court has recognized as a substantial governmental interest. *Kovacs* v. *Cooper, supra.*

(5)

As we noted in our main brief, Joseph Killian considered a number of alternatives before determining that the best solution was an independent professional sound company. Pet.'s br., p. 9. Respondents, at trial, did not offer any alternative solutions.

Now in its brief to this Court, respondent suggests that "more reasonable alternatives than those employed by respondents (sic) are readily available." Resp.'s br., p. 22. Respondent suggests enforcement of existing laws and regulations against excessive noise. At the trial, the City proved that summonses for excessive noise issued to RAR on earlier occasions were never paid (JA343). The evidence also showed that RAR repeatedly violated agreed-upon sound levels in the face of repeated requests by police to reduce sound (A 47; JA131-133; 345-347). At least one request to turn down the sound resulted in RAR members provoking the crowd against the police (JA346-347). And, at least twice, the plug on RAR had to be pulled in order to stop their event from continu ng beyond the time allotted on their permit (JA140-141). Ignoring its history of uncooperativeness and belligerence, respondent now suggests as an alternative solution the es-

tablishment of a decibel limit. Resp.'s Br., p. 22. The proof at trial showed this solution to be impractical (JA220, 285-286).

Respondent also recommends use of a sound control device as an alternative solution to the noise problem at the Bandshell. Resp.'s br., p. 22. Respondent offered no proof at trial, and offers no proof now, that such a solution is technically feasible and a practical solution. The Second Circuit, also without any evidence, makes the same suggestion, finding that in the alternative, the City can always pull the plug to enforce sound limits (A18-19, 21).[6] The impracticality of such a solution before an excited crowd at a concert is self-evident.[7] The City's solution as provided by the Use Guidelines, however, has been tested and proven.

(6)

Respondent also contends that the Use Guidelines give City officials "unfettered control over musicians and concert promoters right to freedom of expression . . . " Resp.'s br., p. 16. Respondent's claim makes no reference to the record. Certainly, the Use Guidelines do not provide park officials with any discretion in granting or denying a permit for the Bandshell based on the content or viewpoint of speech of the permittee. *City of Lakewood* v. *Plan Dealer Pub. Co.*, __U.S.__, 108 S. Ct. 2138, 2145 (1988). They

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[6] The difficulty with respondent's and the Circuit Court's suggestion is that it takes no account of the fact that the controls, volume, and mixing are contained on a single board and are manipulated, as explained by Alan Thompson, sound engineer for RAR, continuously during the performance (JA101-102; 120-122). Thus, to separate the two interrelated functions and place the mixing controls in one party's hands and the volume control in another's (assuming the feasibility of such a solution) is to create a contentious predicament whereby the user's expression might be compromised because of lack of coordination between the two controls. Allowing both functions to be in the hands of one qualified person allows the mix and volume controls to be adjusted in a complimentary way that suits the expression of the Bandshell user, while containing volume within the audience area.

[7] It is worth noting that while the Second Circuit concludes that pulling the plug is a less restrictive alternative to maintaining volume control, the District Court reached the opposite conclusion (A48).

do, however, limit the user's expression insofar as the volume may be raised only so that listeners in the Bandshell area should be able to hear the performance, while others are not necessarily obliged to listen to it (A14-15). Insofar as respondent claims that the Use Guidelines "[do] not even acknowledge the interests of performers and/or their audience in the quality of the music produced" (Resp.'s br., p. 17), the District Court found that they have been interpreted by the Parks Department to require providing sound mix and quality tailored to the dictates of the user, while ultimate control of the volume has remained under the City's control (A40, 42, 47). *Hoffman Estates* v. *Flipside, Hoffman Estates*, 455 U.S. 489, 494 n.5 (1982), citing *Grayned* v. *City of Rockford*, *supra*. ("In evaluating a facial challenge to a state law, a federal court must, of course, consider any limiting construction that state court or enforcement agency has proferred.") In addition, the Use Guidelines are framed in terms of providing "the best sound for all events" (375). *Grayned* v. *City of Rockford*, *supra*, 408 U.S. at 108. Since the District Court found that the Parks Department's construction and implementation of the Use Guidelines has been proven to provide users with the mix and quality sound they sought (A88-89), respondent's contention is without evidentiary substantiation.

Respondent hypothesizes a host of potentially unconstitutional applications of the Use Guidelines. Again, without reference to the record, respondent asks "what if" the City "decides it can no longer afford New York Sound and hires one of the companies it previously rejected?"; or "[w]hat if the engineer for New York Sound becomes ill and his replacement is less talented or experienced?" and so on. Resp.'s br., p. 20. Respondent's questions are premature. If the Use Guidelines survive facial scrutiny, then any subsequent unconstitutional application should be reviewed on a case-by-case basis. *See, Broadrick*, v. *Oklahoma*, 413 U.S. 601, 615-616 (1973). The theoretical possibility that the Parks Department may enforce the Use Guidelines in an unconstitutional manner does not give rise to a present constitutional claim.

Hoffman Estates v. *Flipside, Hoffman Estates, supra*, 455 U.S. at 503 n.21 (A49).

CONCLUSION

The Judgment Of The Court Of Appeals For The Second Circuit Should Be Reversed, With Costs. The Judgment Of The District Court Which Declared The Use Guidelines Constitutional Insofar As They Required Permittees To Use Only The Department Of Parks And Recreation's Sound Engineer And Sound System Should Be Reinstated.

New York, New York
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In the Supreme Court of the United States

OCTOBER TERM, 1988

BENJAMIN R. WARD, ET AL., PETITIONERS

v.

ROCK AGAINST RACISM, RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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QUESTION PRESENTED

Whether the First Amendment requires municipal officials who, as a means of controlling noise in a public park, compel sponsors of concerts at a park Bandshell to use a publicly-provided sound system and technician to demonstrate that this requirement is the least restrictive means available to achieve their noise-control objective.

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INTEREST OF THE UNITED STATES

This case presents important questions concerning the constitutionality of efforts by governmental officials to regulate the use of sound amplification equipment in public parks. The National Park Service is charged with promoting and regulating the use of the national parks, 16 U.S.C. 1. Each year it issues permits for over a thousand performances, demonstrations, and other special events in the National Capital area alone. The Secretary of the Interior has

issued regulations governing demonstrations and other events in the Capital-area parks, one of which addresses the use of various kinds of sound enhancement equipment. That regulation authorizes the Regional Director of the Park Service to limit the use of such equipment so that it "will not unreasonably disturb nonparticipating persons" in the parks (36 C.F.R. 7.96(g)(5)(xii)(B)). The United States therefore has a strong interest in the legal standards applying to this type of regulation.

STATEMENT

1. Petitioners are the City of New York and several of its officials with responsibility for overseeing the administration of its parks. In January 1986, the City hired petitioner Joseph Killian to be the program director for the Naumburg Acoustic Bandshell in Central Park. The Bandshell is an outdoor amphitheatre, surrounded by grassy areas and trees. To its west lies Sheep Meadow and ultimately residential apartments on the West Side of New York (Pet. App. 38-39). One of Killian's first responsibilities was to draft guidelines governing the numerous events that take place at the Bandshell each year (*id.* at 28-29).

When he drafted the guidelines, Killian was aware of complaints that sound from Bandshell events was "bleed[ing]" out beyond the concertground (C.A. App. 278-279). He considered several alternative solutions to this problem, including negotiating with concert sponsors concerning decibel levels or providing a city technician to operate the sponsors' sound equipment (*id.* at 287). He concluded, however, that

a single decibel level would be unworkable because of differences in foliage and other conditions at particular concerts and that city technicians would not perform adequately using unfamiliar equipment (*id.* at 287-288). Accordingly, the guideline adopted provides that the Parks Department will be the sole provider of sound amplification. The Department contracts for this service with a private company, New York Sound (Pet. App. 36).[1]

Respondent, Rock Against Racism, is an unincorporated association "which describes itself as 'dedicated to the espousal and promotion of anti-racist views'" (Pet. App. 24). Since 1979, respondent has sponsored an annual "musical/political event," including music and speeches, at the Bandshell (*id.* at 25). Respondent first filed suit against the City prior to its 1985 concert, seeking injunctive relief against what it viewed as interference by the City. The dispute was settled as to that year's performance (*id.* at 26). After the City promulgated its guidelines in 1986, respondent reactivated its suit and obtained a preliminary injunction permitting it to use its own sound system at its 1986 event.[2] Following the 1986 concert, respondent amended its complaint to seek

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[1] The guidelines also addressed such other issues as permits, hours and dates of use, fees, and liability insurance, among others. A number of these guidelines were challenged in the district court, and it declared some of them unconstitutional (Pet. App. 54-55, 58-76). Because the City did not take an appeal with respect to those guidelines, their validity is not before the Court.

[2] The district court opinion granting the preliminary injunction is reported at 636 F. Supp 178 (S.D.N.Y. 1986).

a declaratory judgment "striking" the City's guidelines, as well as compensatory and punitive damages (*id.* at 26-27).

2. After discovery, the district court heard five days of oral testimony, and on April 6, 1987, issued its Memorandum Opinion and Order (Pet. App. 23-81). The district court held that the sound amplification guideline was constitutional (*id.* at 36-49).

The court found that the City had made diligent efforts to select a quality sound system for the Bandshell—retaining a consultant and stressing quality, not price, in its choice (Pet. App. 39-40). It also found that sponsors of a wide variety of events, running "the full cultural gamut from grand opera to salsa to reggae," had used the system and were uniformly pleased with the quality of its sound (*id.* at 41). The district court found that "[t]he City's practice for events at the Bandshell is to give the sponsor autonomy with respect to sound mix, *i.e.*, balancing treble with bass, highlighting a particular instrument or voice, and the like. The New York Sound engineer does all that he can to accommodate the sponsor's desires in those regards" (*id.* at 42).[3]

The engineer supplied by the City retains control over the volume of the sound at each concert (Pet. App. 42-43). However, the district court found that when a question of excessive sound arises, Killian makes it a practice to confer with the sponsor before taking corrective action (*id.* at 43). The City attempts to keep the sound sufficiently loud to reach listeners within the concertground, but not so loud

[3] In denying a post-trial motion, the district court ruled that there was no evidence that the technician supplied by the City was unable in any way to implement the instructions of the sponsors. Pet. App. 89.

that it will extend unnecessarily into adjoining areas of the park, where people may be pursuing other forms of recreation (*ibid.*).

The district court characterized Central Park as a "public forum" for purposes of the First Amendment (Pet. App. 32), but concluded that the City had a legitimate governmental interest in controlling excessive noise there (*id.* at 44). While the court "accept[ed] that [respondent] has a First Amendment right to the use of a sound amplification system capable of producing the quality of sound it desires, and the level of sound necessary to reach throughout the audience area" (*id.* at 46), it characterized respondent's interest in using its own system and technician, on the evidence before it, as attenuated at best (*id.* at 47). Noting that the record limited respondent to a challenge to the sound amplification guideline on its face, the court held that the guideline was constitutional because it did not "impinge upon a protected right" and "was narrowly tailored to further a legitimate governmental interest" (*id.* at 48).

3. The court of appeals reversed. The court acknowledged that the City has the power "to regulate expressive conduct which has harmful effects upon others" (Pet. App. 10), and stated that "[c]ontent neutral time, place and manner regulations are permissible so long as they are narrowly tailored to serve a substantial government interest and do not unreasonably limit alternative avenues of expression" (*id.* at 11). However, citing *United States* v. *O'Brien*, 391 U.S. 367, 377 (1968), the court also stated that "the method and extent of such regulation must be reasonable, that is, it must be the least intrusive upon the freedom of expression as is reasonably nec-

essary to achieve a legitimate purpose of the regulation" (Pet. App. 12).

Applying these standards, the court of appeals adverted to several alternative methods of controlling volume (Pet. App. 18),[4] and concluded that the City had not demonstrated that requiring sponsors to use the sound system and engineer provided by New York Sound "was the least intrusive means of regulating volume" available (*id.* at 20). The court described a sponsor's choice of a sound system and its operation as "an element of the artistic performance" that is "protected as a means of artistic expression" (*ibid.*). The City, the court concluded, had not shown "a justification for intrusion upon that right of expression, nor [had] the city shown that such intrusion is reasonably necessary to control the volume" (*ibid.*). The court of appeals held that the City's guideline was a violation of respondent's First Amendment rights to the extent that it required use of a publicly-provided sound system and technician (*id.* at 22).

SUMMARY OF ARGUMENT

The City's sound amplification guideline is a restriction on the manner in which performers at the Bandshell may communicate with their audiences. As such, it is subject to standards, set forth in a number of this Court's decisions, which require that

[4] The court stated that the City could permissibly limit the decibels of a performance or the power of a sponsor's equipment (Pet. App. 13-14). The panel also raised as possibilities allowing the sponsor's technician to operate the sound mixing board subject to a city technician's control over volume or perhaps by means of a device "to limit sound output" (*id.* at 18-19). As a last resort, the court said, the City could "pull the plug" on an recalcitrant sponsor (*id.* at 21 n.6).

time, place and manner restrictions on First Amendment activity be justified without reference to the content of the regulated speech, be narrowly tailored to serve a significant governmental interest, and leave open ample alternative channels for the expression involved.

The straightforward application of these standards to the district court's findings of fact compels the conclusion that the sound amplification guideline is constitutional. The guideline is content-neutral. All performers in the Bandshell are required to use the sound system supplied by the City and are given complete artistic autonomy in all respects except volume. Preventing excessive noise is a legitimate state interest. The means selected to further that interest —choosing a high-quality sound system, requiring all performers to use it, and honoring their artistic preferences as to sound mix—is narrowly tailored to further that interest. Finally, performers at the Bandshell have not been deprived of ample channels to deliver their message. The City's engineer is capable of implementing performers' musical preferences and, during the 1986 season, everyone except respondent—who did not actually use the system—expressed satisfaction with the quality of the amplified sound. The City should have to prove nothing further to justify its sound amplification guideline as a reasonable time, place, or manner restriction.

The "least restrictive alternative" approach followed by the court below cannot be reconciled with this Court's decisions, and the court of appeals' reliance on *United States* v. *O'Brien*, 391 U.S. 367 (1968), was misplaced. In *Clark* v. *Community for Creative Non-Violence*, 468 U.S. 288, 298 & n.8 299 (1984), this Court explained that *O'Brien* em-

bodies essentially the same standards as the Court's time, place and manner decisions, and described itself as unmoved by an argument that there were less restrictive alternatives to a challenged regulation. The Court has since reiterated that a regulation is not unconstitutional "simply because there is some imaginable alternative that might be less burdensome on speech." *United States* v. *Albertini*, 472 U.S. 675, 689 (1985).

The court of appeals' least restrictive alternative approach is completely unworkable in the context of public parks. Judgments concerning whether particular regulations are advisable must depend, in the first instance, on expert assessments of the relative importance of competing uses of the parks and the best means of allocating scarce park resources among those uses. In this context, judicial review looking to whether a less intrusive alternative to a particular regulation can be imagined would substitute the judiciary for duly selected park officials on an important issue of park management.

The problems that the approach of the court below would present to managers of our National Parks —especially those in the National Capital area—are particularly acute. The events that take place annually in Capital-area parks run the gamut from Fourth of July celebrations on the Mall, to marches on Washington, to folk festivals, to hundreds of smaller demonstrations and assemblies. The Park Service must rely on a variety of techniques for regulating sound in all of these settings. The First Amendment does not and cannot require it to satisfy a court that it has selected the least restrictive of all possible alternative means of preventing excessive noise for each of the events that takes place in a national park.

Indeed, we believe that such a requirement would actually impair the very First Amendment values it purports to serve. It would necessitate microscopic judicial analysis of the elements of First Amendment activity in each individual case and equally detailed attempts at accommodating them. The result would be to call into question reasonable conditions for use of the parks that are applied evenhandedly to all points of view. By contrast, the Court's traditional approach to time, place and manner restrictions demands official neutrality, effective and focused regulation, and ample channels for communication of all messages. That framework structures the judgments of park officials and courts, and defines their respective roles, in a manner which more effectively accommodates the constitutional, public and governmental interests at stake.

ARGUMENT

I. NEW YORK CITY'S SOUND AMPLICATION GUIDELINE IS A CONSTITUTIONAL RESTRICTION ON THE MANNER IN WHICH BANDSHELL PERFORMERS MAY REACH THEIR AUDIENCES

Both lower courts assumed, and it is apparently not disputed by the parties, that the Bandshell is a "public forum" for purposes of First Amendment analysis. See, *e.g.*, *Perry Education Ass'n* v. *Perry Local Educators' Ass'n*, 460 U.S. 37, 45-46 (1983); *Hague* v. *C.I.O.*, 307 U.S. 496, 515-516 (1939). In such a forum, the government's power to prohibit First Amendment activity is limited. However, the state may impose reasonable limitations on the time, place, and manner of speech. The standards for such regulations are now well-established. Such regulations are valid (*Clark*, 468 U.S. at 293):

provided that they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.[5]

In our view, the straightforward application of these standards to the district court's detailed findings of fact compel the conclusion that the City's sound amplification guideline regulation is constitutional.

A. The Guideline Is Justified Without Reference to Content

The City's guideline is content-neutral. Because its principal purpose is to assure the effectiveness of the City's efforts to prevent excessive noise in its park, it is "justified without reference to the content of the regulated speech" (468 U.S. at 293). See *City of Renton* v. *Playtime Theatres, Inc.*, 475 U.S. 41, 47-48 (1986). The application of the sound amplification guideline is not at all "dependent * * * on the nature of the message being conveyed" (*Carey* v. *Brown*, 477 U.S. 455, 461 (1980)), nor does the guideline permit the City "to discriminate on the basis of the content of the message" that any performer wishes to convey (*Regan* v. *Time, Inc.*, 468 U.S. 641, 648 (1984)).

On the district court's findings, the sound amplification guideline is scrupulously evenhanded. The

[5] Accord, e.g., *Frisby* v. *Schultz*, No. 87-168 (June 27, 1988), slip op. 6, 9; *City of Renton* v. *Playtime Theatres, Inc.*, 475 U.S. 41, 47 (1986); *City Council* v. *Taxpayers for Vincent*, 466 U.S. 789, 812 (1984); *United States* v. *Grace*, 461 U.S. 171, 177 (1983); *Perry Local Educators' Ass'n*, 460 U.S. at 45-46; *Heffron* v. *International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 647-648 (1981).

City requires all performers to use its sound system and technician, but gives them complete autonomy with respect to all issues of sound mix. The City retains control only over volume, which it exercises so that the sound from an event will "reach all listeners within the defined concertground" (Pet. App. 43). The guideline thus affords "all points of view an equal opportunity to be heard." *Police Department of Chicago* v. *Mosley*, 408 U.S. 92, 96 (1972). And it is "not open to the kind of arbitrary application that this Court has condemned as inherently inconsistent with a valid time, place, and manner regulation because such discretion has the potential for becoming a means of suppressing a particular point of view." *Heffron*, 452 U.S. at 649.[6]

B. The Guideline Is Narrowly Tailored To Serve A Significant Governmental Interest

Both lower courts agreed that the City's desire to control noise in the park—the guideline's principal objective—was a legitimate state interest (Pet. App. 12, 44). This Court's decisions compel that conclusion. *Grayned* v. *City of Rockford*, 408 U.S. 104, 116 (1972); *Kovacs* v. *Cooper*, 336 U.S. 77 (1949). See *Saia* v. *New York*, 334 U.S. 558, 562 (1948); *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 387 (1969). "If overamplified loudspeakers assault the

[6] The court of appeals rejected respondent's contention that the sound amplification guideline was unconstitutional because it allows discrimination along points of view in terms of volume (Pet. App. 14-15). The court explained that the regulation was constitutional on its face, since it implies that the sound will be loud enough for each particular audience to hear, but not so loud as to oblige others to listen (*ibid.*). There was no showing that the City had discriminated, in terms of volume, in applying the sound amplification guideline (*ibid.*).

citizenry, government may turn them down." *Grayned*, 408 U.S. at 116.

In *Clark*, this Court suggested that the relation between a regulation's end and its means is sufficiently narrow if the means is "focused" on the permissible objective and is effective in furthering it (468 U.S. at 296-298). The City's guideline passes muster on both counts.[7] The guideline focuses specifically on the City's substantial interest in preventing excessive noise in Central Park, and furthers that objective by putting control over volume in the hands of a City-employed engineer. Thus, while it preserves the sponsor's autonomy on issues of sound mix, the guideline "responds precisely to the substantive problem which legitimately concerns" the City (*City Council* v. *Taxpayers for Vincent*, 466 U.S. at 810), and "targets * * * no more than the exact source of the 'evil' it seeks to remedy" (*Frisby* v. *Schultz*, No. 87-168 (June 27, 1988), slip op. 10).

The guideline also has the degree of effectiveness prescribed by the Court's cases. A time, place and manner regulation need not be perfectly tailored (*Clark*, 468 U.S. at 296-297), but it must promote "a substantial government interest that would be achieved less effectively absent the regulation" (*United States* v. *Albertini*, 472 U.S. 675, 689 (1985)).[8] This

[7] The district court held that the sound amplification guideline was "narrowly tailored" to serve this objective (Pet. App. 47, 48). Its detailed findings of fact fully support that conclusion.

[8] Accord *Clark*, 468 U.S. at 297 ("If the Government has a legitimate interest in ensuring that the National Parks are adequately protected, which we think it has, and if the parks would be more exposed to harm without the sleeping prohibition than with it, the ban is safe from invalidation under the First Amendment as a reasonable regulation of the manner in which a demonstration may be carried out.").

degree of effectiveness is self-evident from the guideline itself, and has been confirmed by the City's actual experience. The district court found that the City's earlier, less direct, attempts to control volume had been unsuccessful. "[P]rior efforts on the part of the Parks Department's representatives to reduce [respondent's] sound levels [had] been non-availing and confrontational" (Pet. App. 47). No greater showing of effectiveness is necessary under *Clark*. The judgment of how a chosen level of noise is to be attained is for City officials, not a court (468 U.S. at 299).

C. The Guideline Leaves An Ample Channel Of Communication For Bandshell Performances

On its face, the sound amplification guideline does not significantly narrow the channel of communication between performers and audiences at the Bandshell. The City does not interfere with performers on the stage at all. It endeavors to maintain the volume at a level that, in view of the conditions present at each individual event, permits all members of the audience to hear (Pet. App. 14). The engineer supplied by the City "does all he can to accommodate the sponsor's desires" on artistic issues (*id.* at 42). The district court specifically found, in denying respondent's post-trial motion, that the City's engineer is "able properly to implement a sponsor's instructions as to sound quality or mix" (*id.* at 89). The City took pains to choose a quality sound system (*id.* at 39-40). And all performers who actually used the system during the 1986 season were "uniformly pleased" (*id.* at 41). By comparison with any of the Court's time, place and manner decisions, any inter-

ference with the relevant First Amendment channel of communication is minimal.[9]

The fact that sponsors are not permitted to select and operate the sound system for their performances, even though these actions are "an element of the artistic performance" and "thus are protected as a means of artistic expression" (Pet. App. 20), suggests no different conclusion. "Reasonable time, place, or manner restrictions are valid even though they directly limit oral or written expression." *Clark*, 468 U.S. at 298 n.8. The Court's cases require that a time, place, or manner restriction preserve a channel of communication that is "ample," not unaffected. "[T]he First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired." *Heffron*, 452 U.S. at 647. The district court's findings of fact justify its characterization of a sponsor's interest in the selection and operation of a sound system as "attenuated at best" for purposes of the First Amendment (Pet. App. 47).[10]

Moreover, the Court's cases foreclose a narrow definition of the relevant channel of communication for purposes of analyzing a time, place, or manner restriction. It is virtually always possible to isolate

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[9] See, *e.g.*, *Frisby*, slip op. 9; *Clark*, 468 U.S. at 295; *City of Renton*, 475 U.S. at 53-54; *Heffron*, 452 U.S. at 654-655.

[10] Since the City technician follows a sponsor's preferences on artistic matters and is capable of implementing them, these artistic elements have not been shown to affect what the audience hears at all. Thus, the First Amendment interest burdened by the sound amplification guideline is limited to whatever intrinsic value there is in selecting the system and operating the controls. That interest is relatively small in terms of First Amendment values.

one element of First Amendment expression which bears the brunt of a time, place, and manner regulation and to characterize the regulation as a complete ban on that expressive element. Here, for instance, it could be said that the City's sound amplification guideline prohibits outright those aspects of artistic expression which are inherent in the selection and direct control of the Bandshell's sound system. However, if a regulation were invalid simply because it foreclosed some aspect of expression, virtually every time, place or manner regulation would be unconstitutional. Far from accepting such an approach, this Court has consistently viewed the protected "channel" of comunication broadly, and has examined the adequacy of the opportunities remaining for expression.

In *Heffron* v. *International Society for Kirshna Consciousness*, *supra*, for example, the members of the Society were required to sell their religious literature from a booth at a state fair, and were not allowed to wander around the fairground to engage in that activity. The Society claimed that the rule was "a total ban on protected First Amendment activities in open areas of the fairgrounds" (452 U.S. at 655 n.16). The Court rejected this characterization, stating that it "is inaccurate to say that [the rule] constitutes a ban on such protected activity in the relevant public forum" (*ibid.*). Similarly, in *Clark*, it would have been just as possible to describe the Park Service's rule as a "total ban" on symbolic sleeping, which the Court assumed was protected activity. However, the Court framed the relevant issue as whether "the plight of the homeless could * * * be communicated in other ways." 468 U.S. at 295. From the proper perspective, in short, the sound am-

plification guideline preserves an "ample" channel of communication.

D. *United States* v. *O'Brien* Does Not Support The Court of Appeals' Least Restrictive Alternative Test

The court of appeals found support for its least restrictive alternative test in *United States* v. *O'Brien*, *supra*.[11] However, the Court's subsequent cases have made clear that *O'Brien* does not impose more stringent limitations on content-neutral regulations than the Court's time, place and manner decisions. In *Clark*, the Court described the "four-factor standard" of *O'Brien* as "in the last analysis * * * little, if any, different from the standard applied to time, place, or manner restrictions" (468 U.S. at 298; accord *id.* at 308 n.6 (Marshall, J., dissenting)). The Court explained that if "the time, place or manner restriction on expressive sleeping * * * sufficiently and narrowly serves a substantial enough governmental interest to escape First Amendment condemnation, it is untenable to invalidate it under *O'Brien* on the ground that the governmental interest is insufficient to warrant the intrusion on First Amendment concerns or that there is an inadequate nexus between the regulation and the interest sought to be served." *Id.* at 298 n.8.[12]

[11] In *O'Brien*, the Court held that an individual's conviction for burning his draft card did not violate his First Amendment rights. It stated that a regulation that applies to conduct that combines "speech" and "non-speech" elements is justified (391 U.S. at 377):

> if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

Further, in *Clark*, the Court specifically refused to read *O'Brien* as imposing a least restrictive alternative test on time, place, or manner restrictions. The Court described itself as "unmoved by the * * * view that the challenged regulation is unnecessary, and hence invalid, because there are less speech-restrictive alternatives that could have satisfied the Government interest in preserving park lands" (468 U.S. at 299). And it added that various alternatives that the D.C. Circuit had proposed as arguably less restrictive of First Amendment speech "represent[ed] no more than a disagreement with the Park Service over how much protection" the parks require and how that level of protection was to be attained. The Court stated that neither *O'Brien* nor its time, place or manner decisions "assign to the judiciary the authority to replace the Park Service as the manager of the Nation's parks." 468 U.S. at 299. Similarly, in *Albertini*, 472 U.S. at 689, the Court reiterated that time, place, and manner regulations are not invalid "simply because there is some imaginable alternative that might be less burdensome

[12] Accord *Albertini*, 472 U.S. at 689 ("[A]n incidental burden on speech is no greater than is essential, and therefore is permissible under *O'Brien*, so long as the neutral regulation promotes a substantial government interest that would be achieved less effectively absent the regulation."). See also *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976) (classifying *O'Brien* as a time, place, and manner case); *City Council* v. *Taxpayers for Vincent*, 466 U.S. at 804-805, 808-810 (using elements of both tests in a single case).

on speech." See *Regan* v. *Time, Inc.*, 468 U.S. at 657 (opinion of White, J.) ("The less-restrictive-alternative analysis * * * has never been a part of the inquiry into the validity of a time, place, and manner regulation. It is enough that the * * * regulation substantially serves the Government's legitimate ends.").[13]

II. A LEAST RESTRICTIVE ALTERNATIVE REQUIREMENT WOULD BE COMPLETELY UNWORKABLE AS APPLIED TO LIMITATIONS ON EXPRESSION TAKING PLACE ON PUBLIC PARK LANDS

There are insuperable objections to the application of a least restrictive alternative requirement in the context of public lands that are managed with the competing interests of many users in mind. Any such

[13] In some early decisions from which the Court's time, place and manner standards evolved, less restrictive alternatives were invoked to demonstrate graphically that the challenged statutes were not focused on the evils they were allegedly enacted to eliminate. For instance, in *Schneider* v. *State*, 308 U.S. 147 (1939), the Court held that a municipality could not constitutionally ban handbilling as a way of controlling litter. In the Court's more recent cases, this type of defect has been more precisely stated in terms of a statute's failure to "focus on" or "target" an evil accurately. See *Frisby*, slip op. 10; page 12, *supra*. Indeed, in *City Council* v. *Taxpayers for Vincent*, 466 U.S. at 809-810, the Court distinguished the ban on posted signs in issue in that case from *Schneider*'s prohibition on handbilling by pointing out that it was the signs themselves that caused the urban clutter that the ban was enacted to eliminate. However stated, the basic requirement is that a time, place and manner regulation must be focused on the evil it seeks to alleviate. None of the Court's cases suggest that a court is justified in questioning state or local officials' choice from among means that are reasonably directed at a permissible purpose.

requirement is inadministrable even in its own terms. Moreover, it necessarily involves courts in determining not only "how much protection of park lands is wise and how that level of conservation is to be attained" (*Clark*, 468 U.S. at 299), but how best to balance a broad range of other individual and group interests. Under the guise of determining whether park managers have chosen the means of furthering permissible goals that provides the *optimal* balance between those goals and free expression, courts unavoidably intrude on policy judgments about the priority to be given to various competing uses of park lands. Further, expressive activity typically consists of a number of elements viewed from two perspectives, the speaker's and the audience's, and it is therefore not even possible in many cases to classify a particular regulation affecting expression as more or less restrictive than others.

This case illustrates that point. The court of appeals suggested that the City would have been on stronger ground if it had left the sound equipment in the sponsors' hands but reserved the right to "pull the plug," characterizing that approach as a "reasonable alternative to a restriction on the expressive rights of sponsors" (Pet. App. 21 n.6). The district court reached the opposite conclusion, saying that "[d]irecting a New York Sound Company technician to turn down the sound * * * is less intrusive than pulling the plug" (*id.* at 47-48). There is no correct answer in this debate. The difference is one of perspective. The court of appeals focused on the "expressive rights of sponsors" while the district court emphasized the interests of the performers and the audience in having the performance heard at all. It is virtually impossible, we submit, for a park

manager to show that any alternative regulation is the least restrictive of each individual element of First Amendment activity to which that regulation may be applied.[14]

A least restrictive alternative analysis is particularly unworkable when applied to the National Park system. By comparison to that system, the setting for this case. a single bandshell in Central Park, is a narrow one. The Park Service issues approximately 1500 permits each year for demonstrations and other events in the National Capital area alone. These permits often allow the use of sound enhancement equipment but, like New York's sound amplification guideline, limit the volume to that necessary to reach the relevant audience. The applicable regulation provides in pertinent part (36 C.F.R. 7.96(g)(5)(xii)):

> Sound amplification equipment is allowed in connection with permitted demonstrations or special events, provided prior notice has been given to the Regional Director [of the Park Service], except that * * *
>
> (B) The Regional Director reserves the right to limit the sound amplification equipment so that it will not unreasonably disturb nonparticipating persons in, or in the vicinity of, the area.

[14] The court of appeals' reasoning enabled it to skirt these difficulties, since it invalidated the City's sound enhancement guideline without identifying a particular means through which the City could control the volume under varying conditions at Bandshell events so that the sound would reach, but not overshoot, the particular audience. The court offered some possibilities, but it expressly declined to rule on their constitutionality (Pet. App. 18). Rather, it placed the burden of disproving the adequacy of all other alternatives on the City (*id.* at 19, 21).

This basic standard is applied to an enormous range of activities.[15] There are concerts and folk festivals on the Mall, demonstrations ranging from hundreds of thousands of people to a handful, and a variety of other events at many locations throughout the parks. In implementing its regulation, the Park Service relies on a number of alternatives, reflecting its experience with thousands of events over the years. Ironically, these do not include the method chosen by New York City, supplying and operating a sound system, but have included others that were alluded to in this case. Generally, Park Service officers monitor the sound level at the perimeter of a demonstration or event and attempt to resolve any question of excessive noise with the promoters of an event. Often events are located so that there is access to electrical outlets installed by the government. In those cases, an officer may be stationed near the control panel to insist, when necessary, that the volume be kept at an appropriate level. In other cases, sponsors provide their own generators, but the Park Service retains the right to instruct those in control to moderate the output of their equipment. As a last resort, the Park Service reserves the right to turn off the power when the volume is not kept to a reasonable level. The range of events that the Park Service licenses justifies the range of alternative means of regulating volume that it employs.

[15] The Park Service's basic standard is well understood by the public. See American Civil Liberties Union Fund of the National Capital Area, *Demonstrating in the District of Columbia* 12 (1982) ("Except at the White House sidewalk, sound equipment may be used. It should only be loud enough to clearly be heard at the edge of the audience.").

The First Amendment simply cannot require the Park Service to isolate a single, hard-to-identify least restrictive alternative for each of the events it supervises. New York City and the Park Service have chosen different methods for regulating excessive noise in their respective parks. But the Constitution does not require the City to abandon its choice in favor of an arrangement favored by the Park Service any more than it requires the Park Service to determine whether it would be less intrusive—as the district court suggested—to supply sound equipment for the many events that occur each year in National Capital Parks.

Even from the standpoint of First Amendment values, the approach to time, place, and manner limitations embodied in *Clark* and other opinions of this Court is a far more meaningful and reasonable limitation on the management prerogatives of park managers than the court of appeals' least restrictive alternative analysis. The criteria applied in *Clark* focus judicial review on aspects of a challenged regulation that are most relevant to First Amendment values and thus provide fundamental protection for First Amendment expression. The requirement that a time, place, and manner restriction be content-neutral guarantees official evenhandedness. It assures that the government cannot place unpopular points of view at a relative disadvantage, thereby also assuring that they will receive any benefits extended to potentially more popular speakers. In this case, for instance, the fact that all groups would have to abide by the same sound amplification guideline and use the same sound system was a significant assurance, to all performers, that the guideline would be fair and the system of good quality. The Court's

now well-established time, place, and manner standards also guard against misguided restrictions on speech. The requirement that a regulation be closely-tailored to a legitimate interest protects First Amendment activity from ineffective or unjustified regulations. And the requirement that government preserve "ample alternative channels for communication" sets a floor that protects First Amendment activity even from regulations that serve a legitimate purpose.

These criteria also favor broadly-justified regulations that feature equal access to park facilities for all points of view. When conscientious park officials consider relaxing or restricting a park's use, the *Clark* criteria encourage them to consider the anticipated effects on the entire pertinent category of park users, and to put aside individualized (and potentially discriminatory) concerns. This approach is not just permissible (see 468 U.S. at 297), but preferable from the standpoint of both First Amendment and other legitimate public concerns. It discourages discrimination and unjustified suppression of speech, while preserving for park managers the choices of "how much protection of park lands is wise," "how that level of conservation is to be attained" (*Clark*, 468 U.S. at 299), and how competing park users will be accommodated.

The least restrictive alternative analysis, by contrast, encourages a court to take the particular regulation in dispute as a starting point and to hypothesize marginally less intrusive means of managing the parks. "A judge would be unimaginative indeed if he could not come up with something a little less 'drastic' or a little less 'restrictive' in almost any situation * * *." *Illinois Elections Board* v. *Socialist*

Workers Party, 440 U.S. 173, 188-189 (1979) (Blackmun, J., concurring). This approach diverts attention from the basic issue of a regulation's impact on the constitutionally-relevant channel of communication to such questions as whether, in this case, the City had disproved the technological feasibility of "a volume limiting device" that would have permitted it to regulate volume without operating the mixing board at the Bandshell (Pet. App. 18).

This kind of analysis not only invariably involves courts in the kinds of judgments that should be made by those who are experienced in park management, but also places park managers at the mercy of imaginative efforts to hypothesize marginally "less restrictive" solutions to the problems they face. That approach also tends to favor microscopic attention to First Amendment interests and hand-tailored accommodations that both trivialize First Amendment values and undercut sound park management. In our view, First Amendment values, as well as the interests of the public and the government in the parks, are better served in the long run by broad guarantees of official neutrality and ample channels for First Amendment expression than by case-by-case judicial review of claims that park managers could have selected a marginally better means of preserving the parks or allocating park resources among competing uses.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

BENJAMIN R. WARD, *et al.*,
Petitioners,
v.
ROCK AGAINST RACISM,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF THE NATIONAL LEAGUE OF CITIES, NATIONAL CONFERENCE OF STATE LEGISLATURES, INTERNATIONAL CITY MANAGEMENT ASSOCIATION, NATIONAL ASSOCIATION OF COUNTIES, U.S. CONFERENCE OF MAYORS, AND COUNCIL OF STATE GOVERNMENTS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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Pursuant to Rule 36.3 of the Rules of this Court, *amici* respectfully move for leave to file the attached brief *amicus curiae* in support of petitioners. Petitioners have consented to the filing of this brief; their letter of consent has been filed with the Clerk. This motion is made necessary because respondent's counsel has not responded to our requests by letter and telephone for consent.

Amici, organizations whose members include state, county, and municipal governments and officials through-

out the United States, have a compelling interest in legal issues that affect state and local governments.

This case concerns New York City's regulations for controlling the sound level at public concerts in one of its park facilities—regulations designed to protect the peace and tranquility of its citizens while at the same time preserving the freedom of expression of artistic performance. The City * adopted Use Guidelines providing for the use of a sound amplification system furnished and operated by a private sound technician under contract with the City. The technician was subject to the direction of a representative of the concert's sponsor regarding the sound mix, and exercised independent control only with respect to the overall noise level.

Respondent Rock Against Racism ("RAR"), a group that sponsors an annual "musical/political" event at the Naumberg Acoustic Bandshell ("Bandshell"), filed a facial challenge to the Use Guidelines under the First Amendment, and obtained a temporary injunction against their application to respondent's May 1986 concert. After a trial, the district court, finding that the City's objectives were to control the noise level of concerts and to ensure the quality of sound at Bandshell events, upheld the challenged requirement. The court of appeals agreed with the district court that the City had the right to control the sound volume of Bandshell concerts. The court of appeals, however, reversed in part, concluding that the requirement that a sponsor use the sound system and technician chosen by the City was not the "least intrusive" means to serve that interest.

In *amici*'s view, the application by the court of appeals of "the least intrusive means" standard as the measure of a narrowly tailored regulation affecting expression demonstrates the need for a clear statement by this Court of the meaning of "narrowly tailored." We believe that the City's Use Guidelines would pass scrutiny under a "least intrusive means" test, but our principal concern is that such a test runs against the prevailing weight and logic of this Court's First Amendment cases evaluating content-neutral time, place, and manner regulations. This unduly rigid standard would impose an unwarranted burden on the government without achieving any significantly heightened protection of core First Amendment freedoms.

Amici are also concerned with the expansion by the court below of the rights guaranteed by the First Amendment. The right to self-expression has never before been held to encompass the right to use a particular sound amplification system. In the absence of a showing that the system provided by the City fails to meet respondent's expressive needs, it appears that there is no infringement of its rights that would call for application of the least intrusive means test or any other First Amendment test.

Amici submit that the decision below is wrong. Because this Court's decision will have a direct effect on matters of prime importance to *amici* and their members, *amici* seek leave to file this brief to assist the Court in its resolution of the case.

Respectfully submitted,

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November 29, 1988

* We refer to all petitioners collectively as the "City."

QUESTIONS PRESENTED

1. Whether a municipal regulation designed to control the noise level at concerts in a public park that requires concert sponsors to use sound equipment and technicians provided by the City, but allows sponsors to choose the sound mix, is a valid time, place, and manner regulation.

2. Whether a time, place, and manner regulation of expressive conduct must be the "least restrictive" means in order to be adjudged narrowly tailored.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-226

BENJAMIN R. WARD, *et al.*,
Petitioners,
v.
ROCK AGAINST RACISM,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF THE NATIONAL LEAGUE OF CITIES, NATIONAL CONFERENCE OF STATE LEGISLATURES, INTERNATIONAL CITY MANAGEMENT ASSOCIATION, NATIONAL ASSOCIATION OF COUNTIES, U.S. CONFERENCE OF MAYORS, AND COUNCIL OF STATE GOVERNMENTS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICI CURIAE*

The interest of *amici* is set forth in the motion accompanying this brief.

STATEMENT

1. *The need to control excessive sound in Central Park.*

Central Park, an 843-acre public park located in the center of Manhattan island, was designed in the mid-1800s by Frederick Law Olmsted and Calvert Vaux as a place where persons of all backgrounds could come together in a scenic retreat to escape the tensions and con-

gestion of an increasingly industrialized city. Olmsted viewed Park visitors as gathering "with an evident glee at the prospect of coming together, all classes largely represented, with a common purpose . . . each individual adding by his mere presence to the pleasure of all others, all helping to the greater happiness of each . . . poor and rich, young and old, Jew and Gentile." P. Goldberger, *The City Observed: New York* 187 (1979).

The reasons—indeed, the necessity—for the Park, as Olmsted envisioned it, have increased over time. Studies show that the great majority of visitors still come to Central Park to relax and to escape the rigors of urban life (J.A. 40-43). Over 13 million people visit the Park each year to enjoy its fields, wooded areas, skating rinks, playgrounds, restaurants, lakes, zoo, and the Naumberg Acoustic Bandshell ("Bandshell") (J.A. 24, 40).

The Bandshell is one of the Park's most popular facilities. It is located in one of the most heavily used areas of the Park, approximately two hundred yards from residences on Fifth Avenue, roughly five hundred yards from residences along Central Park West, and less than two hundred yards from a large open field known as the Sheep Meadow, which is specifically set aside for passive recreation and relaxation such as reading and sunbathing (J.A. 214).[1] Approximately 170 sponsored events take place at the Bandshell each year between the spring and early fall (J.A. 202).

Some event sponsors have set the volume at a level far higher than that appropriate for the Bandshell's location, provoking complaints from nearby residents and Park users, including those in the Sheep Meadow area (J.A. 212-16, 397-98). In response, a program director for

[1] Mayor Edward I. Koch designated the Sheep Meadow as a "quiet zone" in July 1985 in response to a significant number of public complaints of excessive sound in the Park. As a result of that designation, the use of radios or other devices creating loud noise is not permitted. See *Radios Restricted at Sheep Meadows and 4 Beaches*, N.Y. Times, July 26, 1985, at B3.

the Bandshell was hired in January 1981 and charged with promulgating regulations to govern its use and to address the problem of excessive sound (J.A. 204-05).

2. ***The Use Guidelines.***

The first program director, petitioner Joseph Killian, conducted an extensive investigation of the problems associated with the use of the Bandshell and the possible regulatory solutions to those problems. It was clear that the prior practice of negotiating with sponsors to control the volume of sound during an event had not worked. Some sponsors, including respondent Rock Against Racism ("RAR"), had either refused to lower the volume or had lowered it only temporarily, increasing it after City representatives had left the scene (J.A. 127-31; 345-47). The only other available method to reduce the volume level had been to cut the electric power to the amplifiers (J.A. 140). Past experience, however, had shown that this approach was not feasible because audiences on occasion became so restless and unruly when concerts were abruptly ended that public safety was threatened. Indeed, during one RAR concert in Central Park, the audience became unruly in response to a Police Department request to reduce the sound volume (J.A. 346-47).[2]

Several alternatives were considered. The option of setting a maximum decibel level was rejected because

[2] The possibility of rioting by crowds at rock or similar concerts is neither illusory nor confined to New York. Rioting is especially likely to occur, and is especially violent, when a concert is stopped by police. See, *e.g.*, *50 Arrested in Riot At Boston Rock Concert*, N.Y. Times, Apr. 25, 1982, § 1, at p. 28, col. 6 (100 police officers armed with mace required to quell riot started when performance in Boston, MA, was stopped due to noise complaints); *National Briefs*, Associated Press ("A.P."), Sept. 20, 1981, AM cycle (Los Angeles, CA) (police in riot gear required to break up "melee" caused when punk rock concert was stopped due to noise complaints); *Riot*, A.P., Apr. 16, 1979, AM cycle (Wichita, KS) (500 officers with tear gas required to stop 3 hour "full-scale riot" that broke out when police shut off power at an outdoor rock concert).

differences in weather, background noise level, foliage, and audience size foreclose the choice of a single maximum decibel level that would be appropriate for all events (J.A. 220; 285-87) and because it was difficult to enforce the level set.[3] Allowing a sponsor to provide its own sound system that would be operated by a City technician was also rejected because lack of familiarity with the equipment would hinder the technician's ability to operate that system (J.A. 219-20) and because sponsors would not want others operating their equipment.[4]

After considering all the factors, Mr. Killian decided to retain a private sound company to provide and operate a complete Bandshell sound system. That approach was embodied in the Use Guidelines adopted by the City[5] in March 1986.[6] Pursuant to the Guidelines, the City con-

[3] For example, RAR members had received summonses in the past, but had failed to appear or pay the fines (J.A. 343).

[4] Allowing each sponsor to provide its own sound system posed other problems as well. The sponsor would have to transport its equipment across Park roads that are otherwise closed to vehicle traffic on weekends, thus posing a hazard to bicyclists and pedestrians (J.A. 238). In 1986, respondent used a school bus and a 40-foot flatbed trailer to transport its equipment across these roads. By contrast, the City's sound vendor uses one van (J.A. 240-41). Furthermore, the past practice of allowing sponsors to use their own equipment could, and at least once did, result in a fire hazard if groups unfamiliar with electrical wiring at the Bandshell connected their equipment to the power source improperly. In 1986, respondent itself created a fire hazard when it bypassed a fuse mechanism at the Bandshell (J.A. 242-44). NYS' familiarity with the Bandshell also allows it to set up its equipment in approximately 45 minutes to an hour (J.A. 232; 242) and greatly reduces the burden on the police and other city employees who must be on hand during Bandshell events (J.A. 126-127; 253-54; 261-63; 308-09; 345-46; 378). RAR once requested access to the Bandshell at 4 a.m. to begin setting up for a concert at noon (J.A. 241) and in fact needed more than six hours to set up (J.A. 242).

[5] We refer to all petitioners collectively as the "City."

[6] The Use Guidelines provide in relevant part:

> To provide the best sound for all events Department of Parks and Recreation has leased a sound amplification system designed for the specific demands of the Central Park Bandshell. To insure appropriate sound quality balanced with respect for nearby residential neighbors and the mayorally decreed quiet zone of Sheep Meadow, all sponsors may use only the Department of Parks and Recreation sound system. DEPARTMENT OF PARKS AND RECREATION IS TO BE THE SOLE AND ONLY PROVIDER OF SOUND AMPLIFICATION, INCLUING THOUGH NOT LIMITED TO AMPLIFIERS, SPEAKERS, MONITORS, MICROPHONES, AND PROCESSORS.
>
> Clarity of sound results from a combination of amplification equipment and a sound technician's familiarity and proficiency with that system. Department of Parks and Recreation will employ a professional sound technician [who] will be fully versed in sound bounce patterns, daily air currents, and sound skipping within the Park. The sound technician must also consider the Bandshell's proximity to Sheep Meadow, activities at Bethesda Terrace, and the New York City Department of Environmental Protection recommendations.

(J.A. 375-76). The full text of the Use Guidelines appears at J.A. 372-79.

tracted with New York Sound ("NYS") to provide all Bandshell events with a complete, top-of-the-line sound system, along with technicians to set up and operate the system (J.A. 151-56). Although only NYS technicians operate the mixing board, they are under instructions to honor all requests from the sponsor as to the mix of the sound[7] and all requests concerning the volume of sound except those that would result in excessive volume (J.A. 172-73; 176-77; 185-86; 222-23; 229-32; 297-98; Pet. App. 41-42).[8]

[7] The function of "mixing" sound consists of combining multiple signals from different sources, such as instruments or vocalists, in varying intensities that suit the tastes and intentions of the performers into one signal that is then amplified through the speakers. Mixing is performed by a sound technician at a "mixing board," which usually also contains the volume control for the music (J.A. 125-29).

[8] The record shows that this system has worked well. Sound volume has been loud enough for Bandshell audiences, but ap-

An appropriate volume of sound is determined to be that volume which can be heard sufficiently by all audience members with minimal "bleeding" of sound outside the Bandshell area into other areas of the Park, such as the Sheep Meadow, or into nearby residences (J.A. 234-36).[9] The sponsor designates a representative to sit at the mixing board during the event and to direct the NYS technician to mix the sound in the manner that the sponsor desires.[10]

3. ***Proceedings below.***

In 1985, respondent applied to the City for a permit to hold a concert at the Bandshell in May 1986. In April

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parently has not offended other Park users or nearby residents. Moreover, despite some initial misgivings, sponsors of Bandshell events, which range from opera and folk music to rock and reggae, have been pleased with the quality of equipment and service provided by NYS. At least one sponsor later retained NYS for another event outside of the Bandshell (J.A. 159-61; 184-85; 226-27; Pet. App. 41). NYS has been responsive to special needs by providing specialized equipment that a particular sponsor may require (J.A. 303-04; Pet. App. 42). Several sponsors have also found that they have saved money on sound amplification because NYS charges the City a bulk rate (J.A. 299-303).

[9] Because the maximum permissible level of sound is set at the time of the event, the NYS technician is able to choose the level appropriate in light of prevailing conditions. This practice avoids the difficulties inherent in choosing a single maximum decibel level (J.A. 223; 285-88). Decisions to lower the volume of sound are made by the City, in conjunction with the event sponsor, after the City and the sponsor together investigate the extent of sound bleeding outside the Bandshell area (J.A. 231-32; 234-36; 296-99).

[10] This practice is fundamentally the same as the method employed by respondent at its concerts. Several bands perform at those events, and respondent's practice, prior to use of the City's system, had been to have each band designate a representative to sit at the RAR mixing board and direct the RAR technicians at the board to mix the sound to suit the performers' tastes and styles (J.A. 100-03). This is a common practice (J.A. 179); and an experienced sound technician, such as those at NYS, is able to grasp the type of mix desired by performers within a few minutes (J.A. 184).

1986, respondent obtained a preliminary injunction on First Amendment and other grounds against the application to it of the Use Guidelines promulgated the previous month, and the concert took place as scheduled.

In November 1986, respondent filed an amended complaint seeking a declaratory judgment that the Use Guidelines were facially unconstitutional, as well as compensatory and punitive damages. The district court found after trial that the Use Guidelines were valid as a content-neutral regulation of the time, place, and manner (specifically the volume) of speech because they were sufficiently narrowly tailored to further the legitimate governmental interest in controlling excessive sound. Pet. App. 23-81. The court found that the NYS sound system met respondent's technical needs, that respondent retained ultimate control over the sound mix because the Guidelines permitted sponsors to choose their own mix, and that the amplification of sound was sufficient to reach throughout the audience area without bleeding into other areas of the Park or into nearby residences. Pet. App. 43, 46-49.[11] The district court also found that the RAR concerts in 1985 and 1986 had generated a number of complaints and that past efforts to reduce the sound volume at those concerts were "non-availing and confrontational." *Id.* at 47.

The Second Circuit reversed in part. Pet. App. 1-22. The court recognized that the Use Guidelines were a content-neutral regulation of the time, place, and manner of expression and that such regulations are permissible so long as they are narrowly tailored to serve a substantial governmental interest and do not unreasonably limit alternative avenues for expression. *Id.* at 11. The court stated further, however, that "the method and ex-

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[11] In a subsequent memorandum opinion and order, the district court confirmed its finding that the Use Guidelines required the NYS technician to defer to the sponsor's desires regarding the mix of sound. Pet. App. 88-89.

tent of such regulation must be reasonable, that is, it must be the least intrusive upon the freedom of expression as is reasonably necessary to achieve a legitimate purpose of the regulation." *Id.* at 12, *citing United States v. O'Brien*, 391 U.S. 367, 377 (1968).[12] The court then held that, although the City had a right to control volume, requiring the use of the sound system and technicians chosen by the City was unconstitutional because it was not the "least intrusive" means of accomplishing that purpose. Pet. App. 13-14, 19-20. The court suggested other methods of regulating the volume that it considered to be less intrusive, including ending concerts by cutting the supply of electricity to the amplifiers. *Id.* at 21 n.6.

SUMMARY OF ARGUMENT

Every First Amendment case must begin with an examination of the protected right and the extent of its alleged infringement. In this case, it is questionable whether the Use Guidelines are subject to First Amendment analysis at all because they do not adversely affect respondent's freedom of artistic expression in any significant way. If the Use Guidelines are analyzed under the standards established by this Court for time, place, and manner regulation of expressive conduct, they are plainly constitutional. They are content-neutral; they leave open ample alternative channels of communication; they serve important governmental interests; and they are narrowly tailored to serve those interests.

The Court's decisions have consistently distinguished such time, place, and manner regulations from content-based restrictions that threaten core First Amendment values. The court below erred in requiring that a narrowly tailored regulation pass muster as the "least

[12] We assume that the court was invoking a standard described by this Court as the "least restrictive means," and we use that term throughout this brief except when referring to the court of appeals' opinion.

intrusive means." The court placed mistaken reliance on *United States v. O'Brien*, 391 U.S. 367 (1968), which did not in fact inquire whether the government had chosen the least restrictive means. The court thus conferred greater First Amendment protection against a narrowly tailored regulation of the sound level of concerts in Central Park than this Court found appropriate against a complete prohibition of one form of political expression. Moreover, *O'Brien* must be read in light of later decisions of the Court that have uniformly upheld reasonable regulation of the time, place, and manner of expressive conduct without inquiring whether a less restrictive alternative could have been employed. To make such an inquiry the touchstone of the validity of content-neutral time, place, and manner regulations would prove unduly burdensome to government regulators without enhancing core First Amendment values. A reasonable legislative choice designed to balance competing concerns should not be set aside by the courts.

ARGUMENT

I. THE USE GUIDELINES ARE A VALID CONTENT-NEUTRAL REGULATION OF THE TIME, PLACE, AND MANNER OF EXPRESSION.

At issue in this case are requirements that those who desire to use the Bandshell in Central Park for concerts and other events use a sound system and sound technician chosen by the City, rather than by them, to amplify and mix the sound at their direction. These requirements are designed to limit the volume level of performances, and the district court's findings make clear that they have no adverse effect on artistic expression with respect to either sound quality or sound mix.

The nature of the Use Guidelines makes any reliance by respondent on the First Amendment tenuous at best. It is clear that the First Amendment does not encompass

a right to broadcast at whatever volume level the speaker chooses. *Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972); *Kovacs v. Cooper*, 336 U.S. 77, 89 (1949). It is equally clear that a performer in a publicly owned Bandshell has no First Amendment right to use his own sound system.[13] Whatever free speech interest respondent has in the type of sound system available to it at the Bandshell, that interest certainly does not extend beyond avoiding distortion of, or other adverse effects on, respondent's artistic expression as a result of poor sound quality. The district court's findings preclude any such claim in this case.

Neither does the extremely minor restriction imposed on performers at the Bandshell by the City's selection of a sound technician intrude on any right protected by the First Amendment. The district court specifically found that the sound technician must follow the directions of the concert sponsor in all matters except excessive volume. Thus, respondent is free to give a concert in Central Park and to express exactly the message that it wants to express in the way that it wants to express it except to the extent that its expression is excessively loud. On these facts, it is difficult even to find a First Amendment right, let alone a First Amendment violation.[14]

The courts below examined the Use Guidelines as a restriction on expressive activity in a public forum, which must be justified as a content-neutral time, place, and manner regulation; and the City disputes neither that

[13] Such a right, if it existed, could not be limited to outdoor facilities or to sound systems put in place for each event, but would require the government to allow a performer to install his own sound system in an indoor concert hall as well.

[14] *See, e.g., Lyng v. International Union, UAW*, 108 S.Ct. 1184, 1189 (1988); *Board of Directors of Rotary Int'l v. Rotary Club*, 107 S.Ct. 1940, 1947 (1987); *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 706-07 (1986); *Roberts v. United States Jaycees*, 468 U.S. 609, 626-27 (1984).

the Bandshell is a public forum nor that the Use Guidelines affect expressive conduct. Examined as a time, place, and manner regulation, the Use Guidelines are clearly constitutional. To be valid, such a regulation must be content-neutral, leave open ample alternative channels of communication, and be narrowly tailored to serve a significant governmental interest. *See, e.g., Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984); *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983). The Use Guidelines easily satisfy these criteria.

A. The Use Guidelines Are Content-Neutral.

The district court specifically found, despite respondent's "faint suggestion" to the contrary, that the Use Guidelines are content-neutral. Pet. App. 34. Respondent did not challenge this finding in the court of appeals and does not challenge it in this Court.

The Use Guidelines do, in fact, meet this Court's definitions of content-neutrality. The Use Guidelines apply to all events at the Bandshell. Their application is not "based upon either the content or subject matter of [the] speech" (*see Consolidated Edison Co. v. Public Service Comm'n*, 447 U.S. 530, 536 (1980); *accord Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 648 (1981)), or any "speaker's point of view" (*see Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984)). Nor is access to the Bandshell dependent in any respect on the content of the performance. Because the Bandshell is available on a first-come, first-served basis (J.A. 316), the Use Guidelines are "not open to the kind of arbitrary application that . . . has the potential for becoming a means of suppressing a particular point of view." *See Heffron*, 452 U.S. at 649. Finally, the Use Guidelines are "justified without reference to the content of the regulated speech." *See Virginia Pharmacy Board v. Virginia Citizens Con-*

sumer Council, Inc., 425 U.S. 748, 771 (1976). They are justified by the City's interests in controlling excessive noise at Bandshell events, protecting public safety, and regulating the use of City property. See Part I.C., *infra*.

B. The Use Guidelines Leave Open Ample Alternative Channels Of Communication.

The facts of this case present no real issue concerning "alternative channels of communication." An issue regarding the adequacy of alternative channels might arise, for example, if respondent had been denied use of the Bandshell or if the City had prohibited any sound amplification there. But respondent has been denied nothing except unrestricted sound amplification, with the limitations on the volume of sound enforced by requiring use of the City's chosen sound system and sound technician. The district court found that replacing the "channel" that respondent wants—the use of its own sound system and sound technician—with the "channel" available to it under the Guidelines—the sound system and sound technician designated by the City—would have no adverse effect on respondent's artistic expression or its ability to convey its message.[15] Thus, the Use Guidelines leave the expression "intact." *See Community for Creative Non-Violence*, 468 U.S. at 295.

For sponsors who insist upon using their own equipment and technicians, there are ample alternative sites for concert performances. The City itself offers three other bandshells—at Prospect Park in Brooklyn, Forest Park in Queens, and Poe Park in the Bronx—that are not subject to the Use Guidelines. There is another City-owned concert facility on Randall's Island; and probably no other city in the United States offers as wide an array

[15] Under the Use Guidelines, some speakers have found that the Bandshell has been improved as a channel for their communication because the sound quality has been enhanced and their costs have been lowered (J.A. 227-28; 299-302).

of privately owned theaters, concert halls, auditoriums, and performance centers.

Nothing in the record indicates that use of the Bandshell is a "uniquely valuable or important mode of communication." *See Vincent*, 466 U.S. at 812. Mere inconvenience or additional cost associated with a concert at another location (and there is nothing in the record to support such a claim) would not establish the constitutional insufficiency of alternative locations. In *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), for example, the Court considered an argument by owners of adult theaters that zoning restrictions left no "commercially viable" sites available within the City. *Id.* at 53. This Court responded that even though "respondents must fend for themselves in the real estate market, on on an equal footing with other prospective purchasers and lessees, [this] does not give rise to a First Amendment violation" because "we have never suggested that the First Amendment compels the Government to ensure that adult theaters, or any other kinds of speech-related businesses for that matter, will be able to obtain sites at bargain prices." *Id.* at 54.

The First Amendment does not confer a right of expression in exactly the manner of the speaker's choosing; it requires only that ample alternative channels exist if one means of expression is restricted. Even if the Use Guidelines are viewed as restricting one channel of communication, they themselves provide another. Alternatively, respondent may use any of innumerable unregulated public and private locations.

C. The Use Guidelines Are Narrowly Tailored To Serve Significant Governmental Interests.

The heart of this case is whether the Use Guidelines are narrowly tailored to serve significant governmental interests. The district court found that the Use Guidelines are intended to regulate the volume of sound at the Bandshell. Pet. App. 40. This Court has recognized

the significance of the governmental interest in regulating excessive sound volume (*see Grayned*, 408 U.S. at 116; *Kovacs*, 336 U.S. at 89), which respondent does not dispute.

The court of appeals, although paying lip service to this interest (Pet. App. 13-14) and to "a city's interest in attempting to preserve the quality of urban life" (*id.* at 10-11), failed to appreciate the problems that the City had experienced in past efforts to control volume at Bandshell events. The court of appeals gave virtually no weight to the rights of other Park users and nearby residents, a "'captive' audience" whose tranquility and relaxation the City may legitimately protect. *See Frisby v. Schultz*, 108 S.Ct. 2495, 2503 (1988), *citing Consolidated Edison*, 447 U.S. at 542. Park users should not have to avoid, and nearby residents cannot avoid, excessive sound volume. Providing them protection through the Use Guidelines furthers a significant governmental interest.

The court of appeals also failed to heed the City's significant interests in public safety and the preservation of public property. By placing control of the volume in the hands of the City, the Use Guidelines reduce the possibility that a Bandshell event will have to be terminated abruptly to control excessive sound levels, a practice that can lead to riots (see page 3 and note 2, *supra*).[16] In addition, the record shows that technicians unfamiliar with the stage can create serious fire hazards (see note 4, *supra*). The Use Guidelines also serve to minimize vehicular traffic through the Park, or at least to

[16] The court of appeals' limited appreciation of the interests at stake here is captured by its suggestion that, if a sponsor's sound technician proved uncooperative, the City could just "pull the plug." Pet. App. 21 n.6. Such an approach does not even serve the City's interest in preventing excessive noise; it surely does not serve the City's interests in public safety and protection of public property.

reduce traffic by those unfamiliar with Park roads and with the City's practice of closing those roads on the weekend (see *ibid.*). Finally, NYS' familiarity with the Bandshell expedites the process of setting up for concerts and thus reduces the administrative burdens on the City's police and other personnel. (See *ibid.*). These important safety and administrative concerns cannot be overlooked in evaluating the Use Guidelines. *See Community for Creative Non-Violence*, 468 U.S. at 299 ("there is a substantial Government interest in conserving park property"); *Heffron*, 452 U.S. at 650 ("protecting the 'safety and convenience' of persons using a public forum is a valid governmental objective").

The Use Guidelines are narrowly tailored to serve these significant interests. They have no adverse effect on freedom of expression because each sponsor determines its own sound mix using the high quality equipment and experienced technicians supplied by NYS. Only excessive volume is affected. The Use Guidelines target and eliminate no more than the exact source of the "evil" they seek to remedy. *See Frisby*, 108 S.Ct. at 2502. Thus, they "respon[d] precisely to the substantive problem which legitimately concerns the City. The [Use Guidelines] curtai[l] no more speech than is necessary to accomplish [their] purposes." *See Vincent*, 466 U.S. at 810.

Any argument that the City could accomplish its objective by less restrictive means ignores the facts concerning past attempts to control sound volume at the Bandshell.[17] The district court specifically found that the City's prior efforts had been "non-availing and confrontational." Pet. App. 47. The court of appeals' sug-

[17] As we discuss in Part II, *infra*, we do not believe that the least restrictive means test is properly applied to content-neutral time, place, and manner regulations. Our point here is simply that the Use Guidelines are in fact the least restrictive means of serving all of the City's interests.

gestion that the City control the sound volume by pulling the plug would, of course, result in a much more serious intrusion on the performance.

In any event, the alternatives suggested by respondent and the court of appeals would not address the additional significant governmental interests at stake. The Use Guidelines are narrowly tailored to prevent crowd disturbances at Bandshell events by eliminating the possibility that the City would have to "pull the plug" to control volume. They also serve to protect the public from fire hazards by allowing only technicians who are familiar with the Bandshell to connect to the power source. Finally, the Use Guidelines minimize unnecessary traffic and administrative burdens by providing a complete sound system to all sponsors. Like the control of sound volume, these interests are served with, at most, a negligible impact on expression.

Respondent's focus on its own dissatisfaction with the Guidelines is misplaced. The determination whether a regulation is narrowly tailored is to be made in light of its overall purpose, not by reference to the facts of a particular case. *See United States v. Albertini*, 472 U.S. 675, 688-89 (1985); *Community for Creative Non-Violence*, 468 U.S. at 296-97. Given the number of governmental interests that the Use Guidelines are designed to serve, they are narrowly tailored.

II. THE LEAST RESTRICTIVE MEANS STANDARD IS NOT THE PROPER MEASURE OF THE VALIDITY OF TIME, PLACE, AND MANNER REGULATIONS.

The court below announced that it was analyzing the City's Use Guidelines in light of the time, place, and manner test applied by this Court in *Community for Creative Non-Violence*, 468 U.S. at 295: "Content neutral time, place, and manner regulations are permissible so long as they are narrowly tailored to serve a substantial government interest and do not unreasonably

limit alternative avenues of expression." Pet. App. 11. The court properly explained that to satisfy this test the regulations must be "reasonable" (*id.* at 12), although, as we argue in Part I, *supra*, the court erred in applying the test to the Use Guidelines. The court continued, however, by defining "reasonable" as "the least intrusive upon the freedom of expression as is reasonably necessary to achieve a legitimate purpose of the regulation." *Id.* at 12; see also *id.* at 16, 20, 21. The court's casual incorporation of a least restrictive means requirement imposes on time, place, and manner regulations a heightened degree of scrutiny that is inconsistent with the prevailing weight and logic of this Court's recent decisions, unduly burdensome on government regulators, and not necessary to protect First Amendment freedoms.

A. *O'Brien* Does Not Require Application Of A Least Restrictive Means Standard To Time, Place, And Manner Regulations.

Among this Court's First Amendment cases, the court of appeals grounded its decision on language used in *United States v. O'Brien*, 391 U.S. at 377. *O'Brien* involved a federal criminal prosecution for the violation of a statute that prohibited the intentional destruction of a draft card. O'Brien argued that the statute could not constitutionally be applied to him because burning his draft card was "symbolic speech" meant to protest the Vietnam war and the draft. 391 U.S. at 376. The Court rejected his contention, applying a four-part test for determining when a governmental interest sufficiently justifies the regulation of excessive conduct. The fourth element, which the court of appeals cited, is whether "the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that [governmental] interest." 391 U.S. at 377.[18]

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[18] The other elements of the *O'Brien* test are whether the regulation "is within the constitutional power of the Government";

This reliance on *O'Brien* is misplaced. As the Court later noted, the phrase "no greater than is essential" appears to require no more than "narrow tailoring." *See Community for Creative Non-Violence*, 468 U.S. at 298 (the four-factor *O'Brien* test is "little, if any, different from the standard applied to time, place, or manner restrictions"); *id.* at 298 n. 8 ("if the time, place, or manner restriction on expressive sleeping . . . sufficiently and narrowly serves a substantial enough governmental interest to escape First Amendment condemnation, it is untenable to invalidate it under *O'Brien*").

Moreover, the court below failed to appreciate that the Court in *O'Brien* did not in fact inquire whether means less restrictive than a complete prohibition would have served the government's interest. See Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 Harv. L. Rev. 1482, 1487 (1975). The court of appeals also appeared to forget not only that *O'Brien* had upheld the restriction challenged in that case,[19] but what the restriction was. *O'Brien* involved a complete prohibition of expressive activity that was at the core of the First Amendment because of its unquestionable political content. In marked contrast, the Use Guidelines are a narrow time, place, and manner regulation that affects at most marginal rights of expression. It is inconceivable that the First Amendment would impose a higher level of scrutiny on a City's attempt to regulate excessive

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whether "it furthers an important or substantial governmental interest"; and whether "the governmental interest is unrelated to the suppression of free expression." *O'Brien*, 391 U.S. at 377.

[19] In fact, in four subsequent cases in which the Court applied the *O'Brien* test, it upheld the challenged regulations. *See United States v. Albertini*, 472 U.S. 675, 687-88 (1985); *Wayte v. United States*, 470 U.S. 598, 611 (1985); *Community for Creative Non-Violence*, 468 U.S. at 298; and *Vincent*, 466 U.S. at 805.

sound levels, without disturbing artistic expression, than on a complete prohibition of one form of political expression.

Finally, *O'Brien* does not stand alone among the Court's First Amendment cases. In the twenty years since *O'Brien* was decided, this Court has developed a sizeable jurisprudence regarding content-neutral time, place, and manner regulations. These cases apply the test set out in Part I of this brief that asks whether the regulation leaves open ample alternative channels of communication and is narrowly tailored to serve a significant governmental interest. *See, e.g., City of Renton*, 475 U.S. at 47; *Community for Creative Non-Violence*, 468 U.S. at 293; *United States v. Grace*, 461 U.S. 171, 177 (1983); *Perry*, 460 U.S. at 45; *United States Postal Service v. Greenburgh Civic Ass'ns*, 453 U.S. 114, 132 (1981); *Heffron*, 452 U.S. at 647-48; *Consolidated Edison*, 447 U.S. at 535. To the extent that these cases represent a different doctrinal line from *O'Brien*, we submit that they formulate the prevailing standard for judging all time, place, and manner regulations.

B. This Court Has Specifically Rejected A Least Restrictive Means Standard For Review Of Time, Place, and Manner Regulations.

On at least three occasions, this Court has rejected attempts to graft a least restrictive means standard onto the time, place, and manner test.[20] In *Community for*

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[20] Although the Court has described this standard as both "less restrictive" and "least restrictive," there would not appear to be any difference in the degree of scrutiny. So long as a court can identify a "less restrictive" alternative, it can strike down a regulation on that basis until no "less restrictive" alternative exists, that is, until the regulation is the "least restrictive" possible. *See City of Watseka v. Illinois Pub. Action Council*, 796 F.2d 1547, 1557 (7th Cir. 1986), *aff'd mem.*, 479 U.S. 1048 (1987); see also Note, *Less Drastic Means and the First Amendment*, 78 Yale L. J. 464,

Creative Non-Violence, the Court applied both the prevailing time, place, and manner test and the *O'Brien* formulation to a claimed First Amendment right to engage in expressive sleeping in the public parks of Washington, D.C. The Court sustained a prohibition of sleeping in the park as a reasonable time, place, and manner regulation and suggested that *O'Brien* required no greater scrutiny. 468 U.S. at 293. The Court further concluded that the regulation was valid even if less restrictive alternatives were available: "We are unmoved by the Court of Appeals' view that the challenged regulation is unnecessary, and hence invalid, because there are less speech-restrictive alternatives that could have satisfied the Government interest in preserving park lands." *Id.* at 299.

Similarly, in *Regan v. Time, Inc.*, 468 U.S. 641 (1984) (plurality opinion), four Justices agreed that a "less restrictive alternative" analysis "places . . . too heavy a burden on those enacting time, place, and manner regulations" and that such analysis "has never been a part of the inquiry into the validity of a time, place, and manner regulation." *Id.* at 656, 657. "It is enough," the plurality concluded, that the regulation "substantially serves the Government's legitimate ends." *Id.* at 657.

Most recently, in *Albertini*, the Court sustained government regulations that barred from a military base persons who had been ordered not to reenter even though the ban was "not 'essential' in any absolute sense to security at the military base." 472 U.S. at 688. In the Court's view, the existence of less restrictive alternatives provided "an answer to the wrong question . . . . [R]egulations [are not] invalid simply because there is some imaginable alternative that might be less burdensome on speech." *Id.* at 688-89.

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464 (1969) (identifying various expressions used by the Court to mean less restrictive).

C. A Least Restrictive Means Standard Would Not Enhance Core First Amendment Values And Would Impose Substantial Burdens On Governments.

The Court has properly refused to subject time, place, and manner regulations to a least restrictive means test. Such heightened scrutiny would provide little, if any, additional protection of core First Amendment values, yet would impose unwarranted and substantial burdens on governments. This Court has recognized that "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95 (1972). For this reason, content-based restrictions are scrutinized with great care to ensure that communication has not been prohibited "merely because public officials disapprove the speaker's views." *Niemotko v. Maryland*, 340 U.S. 268, 282 (1951) (Frankfurter, J., concurring). But the danger of the suppression of ideas does not exist in equal measure where the regulation is content-neutral. Thus, a heightened scrutiny does little or nothing to enhance core First Amendment values.

If content-neutral time, place, and manner regulations were to be subjected to a least restrictive means standard, governmental agencies would incur enormous increased costs—for empirical studies, detailed reports, and protracted meetings—in an attempt to anticipate what a court would subsequently determine to be the least restrictive means of achieving their aims. Even then, "[a] judge would be unimaginative indeed if he could not come up with something a little less 'drastic' or a little less 'restrictive' in almost any situation." *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173, 188-89 (1979) (Blackmun, J., concuring).

The difficulties that governments would face are illustrated by a number of recent cases in which the Court sustained a content-neutral time, place, and manner regu-

lation on the ground that it was narrowly tailored to serve significant governmental interests, but in which the regulation was plainly not the least restrictive. In *Frisby*, a limitation on the size or number of demonstrations would have been less restrictive than the ban on residential picketing (see 108 S.Ct. at 2503-04). In *Regan v. Time*, prohibiting only those illustrations of currency that genuinely had the capacity to deceive would have been less restrictive than prohibiting all color illustrations and all those of a certain size (see 468 U.S. at 656-57). In *Community for Creative Non-Violence*, a limitation on "the size, duration, or frequency of demonstrations" (468 U.S. at 299) would have been less restrictive than the total prohibition of sleeping in the park. And in *Heffron*, "penalizing disorder or disruption, limiting the number of solicitors, or putting more narrowly drawn restrictions on the location and movement of [solicitors]" (452 U.S. at 654) would have been less restrictive than relegating them to a booth. Application of a least restrictive means standard in these and other cases might well have changed the result and thus prevented the government from protecting its concededly significant interests.

Content-neutral regulations of expressive conduct reflect legislative attempts to balance conflicting interests. The privilege of using even the parks, which have "immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions," "is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order." *Hague v. CIO*, 307 U.S. 496, 515-16 (1939) (Roberts, J., concurring). All that is required of the government is that it strike a balance that reasonably accommodates the competing concerns. Here, allowing respondent to assault other park users

and nearby residents with excessive noise, even for short intervals, would not balance their interests, but would sacrifice them. Where, as in this case, regulation with at most a negligible impact on First Amendment rights protects important competing rights that would otherwise be destroyed, the legislative choice of means must be upheld. *See Frisby*, 108 S.Ct. at 2502-04; *Vincent*, 466 U.S. at 810. The Use Guidelines do no more than "maintai[n] [the] public order without which liberty itself would be lost in the excesses of unrestrained abuses." *Cox v. New Hampshire*, 312 U.S. 569, 574 (1941).

The Court has noted time and again that courts should not engage in speculative, *post hoc* calculations of the degree of precision achieved by the government's attempt to tailor a regulation narrowly. "The validity of such regulations does not turn on a judge's agreement with the responsible decisionmaker concerning the most appropriate method for promoting significant government interests." *Albertini*, 472 U.S. at 689. Such judicial ruminations would effectively usurp the legislative function and needlessly involve the judiciary in areas beyond its particular competence.

The Court could have been describing the present case when it wrote:

> There is no gainsaying that [the regulation] will avoid a measure of actual or threatened damage to [the Park]. The Court of Appeals' suggestions that the Park Service minimize the possible injury by reducing the size, duration, or frequency of demonstrations would still curtail the total allowable expression in which demonstrators could engage . . . and these suggestions represent no more than a disagreement with the Park Service over how much protection the core parks require or how an acceptable level of preservation is to be attained. We do not believe, however, that . . . the time, place, or manner decisions assign to the judiciary the author-

> ity to replace the Park Service as the manager of the Nation's parks or endow the judiciary with the competence to judge how much protection of park lands is wise and how that level of conservation is to be attained.

Community for Creative Non-Violence, 468 U.S. at 299. These words demonstrate the clear error of the court of appeals' assumption that it was better able than the City to determine how best to regulate the noise level of concerts at the Bandshell. *Amici* strongly urge the Court, in reversing, to reaffirm unmistakably that the least restrictive means standard has no place in the First Amendment review of time, place, and manner regulations.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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